(9)

No. 96-1671

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED: APRIL 18, 1997
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. 97-CV-1

SENATOR ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DOCKET ENTRIES

DATE		PROCEEDINGS
1997		
Jan. 2	(1)	COMPLAINT filed by plaintiff ROBERT C. BYRD, plaintiff MARK O. HATFIELD, plaintiff CARL LEVIN, plaintiff DANIEL PATRICK MOYNIHAN, plaintiff DAVID E. SKAGGS, plaintiff HENRY A. WAXMAN (kmk) [Entry date 01/03/97]
2	(—)	SUMMONS (4) issued to federal party(s) defendant FRANKLIN D. RAINES, defendant ROBERT E. RUBIN, and non-parties: U.S. Attorney and U.S. Attorney General. (kmk) [Entry date 01/03/97]

DATE		PROCEEDINGS
2	(2)	MOTION filed by plaintiff ROBERT C. BYRD, plaintiff MARK O. HATFIELD, plaintiff CARL LEVIN, plaintiff DANIEL PATRICK MOYNIHAN, plaintiff DAVID E. SKAGGS, plaintiff HENRY A. WAXMAN to expedite this action, and for a scheduling hearing on 1/6/97 or as soon as possible at the Court's convenience (kmk) [Entry date 01/03/97]
3	(3)	RESPONSE by defendant FRANKLIN D. RAINES, defendant ROBERT E. RUBIN to motion to expedite this action [2-1] by plaintiffs, motion for a scheduling hearing on 1/6/97 or as soon as possible at the Court's convenience [2-2] by plaintiffs; attachment (1). (tth) [Entry date 01/06/97]
6	(—)	STATUS HEARING before Judge Thomas P. Jackson, Plaintiff to file motion for summary judgment by 1-27-97, defendant to reply to Plaintiffs motion for summary judgment by 2-26-97, plaintiff to reply by 3-7-97 and defendant to reply by 3-14-97, motion hearing set for 10:00 3/21/97; Reporter: P.Merana (rew)

DATE	PROCEEDINGS
6 (4)	REPLY by plaintiffs to response to motion to expedite this action [2-1] by plaintiffs (tth) [Entry date 01/07/97]
6 (5)	ORDER by Judge Thomas P. Jackson: granting motion to expedite this action [2-1] by plaintiff, defendants to file motion to dismiss by 1-16-97, plaintiffs motion for summary judgment and response to defendants motion to dismiss by 1-27-97, defendants reply to their motion to dismiss and response to plaintiffs motion for summary judgment and intervenors or amici supporting defendant motion due 2/26/97, plaintiffs reply to their motion for summary judgment and response to defendant cross motion if any by 3/7/97, and if defendants have cross-moved for summary judgment defendants shall file brief in support by 3/14/97, and setting motion hearing for 3/21/97 at 10:00 am. (N) (rew) [Entry date 01/07/97] [Edit date 03/19/97]
16 (6)	MOTION filed by defendant FRANKLIN D. RAINES, defendant ROBERT E. RUBIN to dismiss complaint [1-1] for lack of jurisdiction (tth) [Entry date 01/17/97]

DATE		PROCEEDINGS
	27 (7)	NOTICE OF FILING by plaintiffs of Legislative History Materials; Volumes (3) (tth)
	27 (8)	MOTION filed by plaintiffs for summary judgment; attachments (3); declarations (6). (tth) [Entry date 01/28/97] [Edit date 01/28/97]
	27 (9)	MEMORANDUM by plaintiffs in opposition to motion to dismiss complaint [1-1] for lack of jurisdiction [6-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES (tth) [Entry date 01/28/97]
	27 (10)	MOTION filed by plaintiffs for leave to file Legislative Summary; EXHIBIT (LEGISLATIVE SUMMARY) (tth) [Entry date 01/28/97]
Feb. 3	(11)	ORDER by Judge Thomas P. Jackson: granting motion for leave to file Legislative Summary [10-1] by plaintiff, and directing the clerk to accept the summary for filing. (N) (rew) [Entry date 02/04/97]

DATE	PROCEEDINGS
26 (12)	MOTION filed by federal defendant FRANKLIN D. RAINES, federal defendant ROBERT E. RUBIN for summary judgment (tth) [Entry date 02/28/97]
26 (13)	REPLY by federal defendant FRANKLIN D. RAINES, federal defendant ROBERT E. RUBIN to response to motion to dismiss complaint [1-1] for lack of jurisdiction [6-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES (tth) [Entry date 02/28/97]
26 (14)	MOTION filed by movant UNITED STATES SENATE, movant BIPARTISAN LEGAL for leave to appear as amici curiae; attachment (1); EXHIBIT (MEMORANDUM OF THE US SENATE AND BIPARTISAN LEGAL GROUP IN SUPPORT OF THE CONSTITUTIONALITY OF THE LINE ITEM VETO ACT) (tth) [Entry date 02/28/97]

* * * * *

DATE		PROCEEDINGS
26	(16)	RESPONSE by federal defendant FRANKLIN D. RAINES, federal defendant ROBERT E. RUBIN in opposition to motion for summary judgment [8-1] by plaintiffs. (tth) [Entry date 03/10/97]
Mar. 7	(15)	RESPONSE by plaintiffs in opposition to motion for summary judgment [12-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES. (tth) [Entry date 03/10/97]
7	(17)	REPLY by plaintiffs to response to motion for summary judgment [8-1] by plaintiffs (tth) [Entry date 03/ 10/97]
7	(18)	RESPONSE by plaintiffs to defendants' statement of material facts as to which defendants' contend there is no genuine issue [12-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES (tth) [Entry date 03/10/97]
14	(19)	REPLY by federal defendant FRANKLIN D. RAINES, federal defendant ROBERT E. RUBIN to response to motion for summary judgment [12-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES (tth) [Entry date 03/17/97]

DATE	PROCEEDINGS
18 (20)	ORDER by Judge Thomas P. Jackson: granting motion for leave to appear as amici curiae [14-1] by BIPARTISAN LEGAL, UNITED STATES SENATE (N) (rew) [Entry date 03/19/97]
18 (21)	JOINT NOTICE OF FILING by plaintiff, federal defendant, movant of proposed time allocations for oral argument. (kmk) [Entry date 03/ 19/97]
18 (22)	MEMORANDUM by movant UNITED STATES SENATE, movant BIPARTISAN LEGAL in support of the United States House of Representatives as amici curiae in support of the Constitutionality of the Line Item Veto Act (tth) [Entry date 03/20/97]
18 (23)	REPLY by movant UNITED STATES SENATE, movant BIPARTISAN LEGAL to memorandum in support of the Costitutionality of the Line Item Veto Act [22-1] by BIPARTISAN LEGAL, UNITED STATES SENATE; "Let this be filed", JACKSON, J. (tth) [Entry date 03/20/97]

DATE		PROCEEDINGS
20	(—)	SCHEDULING NOTICE: motion hearing set for 9:30 3/21/97; before Judge Thomas P. Jackson. (rew)
21	(—)	MOTION HEARING before Judge Thomas P. Jackson, defendants motion to dismiss and cross motions for summary judgment heard and taken under advisement. Reporter: P. Merana (rew)
Apr. 7	(24)	TRANSCRIPT of proccedings before Judge Thomas P. Jackson filed for date(s) of 3/21/97. Reporter: Phyllis Merana (kmk)
10	(25)	MEMORANDUM AND ORDER by Judge Thomas P. Jackson: denying motion for summary judgment [12-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES, granting motion for summary judgment [8-1] by plaintiffs, denying motion to dismiss complaint [1-1] for lack of jurisdiction [6-1] by ROBERT E. RUBIN, FRANKLIN D. RAINES, and directing the Line Item Veto Act is declared unconstitutional. (N) (N) (rew)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:97CV0001

SEN. ROBERT C. BYRD
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WASHINGTON, DC 20510

SEN. MARK O. HATFIELD
711 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

SEN. CARL LEVIN
459 RUSSELL SENATE OFFICE BUILDING
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SEN. DANIEL PATRICK MOYNIHAN
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REP. DAVID E. SKAGGS
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REP. HENRY A. WAXMAN
2204 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20510, PLAINTIFFS

v.

FRANKLIN D. RAINES,
DIRECTOR OF THE OFFICE OF
MANAGEMENT AND BUDGET
ROOM 252
OLD EXECUTIVE OFFICE BUILDING
WASHINGTON, DC 20503

ROBERT E. RUBIN,
SECRETARY OF THE TREASURY
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WASHINGTON, DC 20220, DEFENDANTS

[FILED: JAN. 2, 1997]

COMPLAINT FOR DECLARATORY RELIEF

1. On April 9, 1996, President Clinton signed into law Pub. L. No. 104-130, 110 Stat. 1200 ("the Act"). The Act, which refers to itself as the Line Item Veto Act, became effective on January 1, 1997. The Act gives the President the authority to "cancel in whole," at any time up to five days (excluding Sundays) after signing a bill into law, any dollar amount of appropriation, any item of new direct spending, or any limited tax benefit contained in the bill. In this action, plaintiffs, who are six Members of Congress, assert that the Act confers on the President powers of veto, revision, and repeal of federal law that violate Article I of the Constitution.

Jurisdiction and Venue

2. This Court has subject matter jurisdiction pursuant to 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 1331.

3. This Court may enter a declaratory judgment under 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 2201.

4. Venue in this Court is proper pursuant to 2 U.S.C. § 692(a)(1).

Parties

5. Plaintiff Robert C. Byrd is a Senator from the State of West Virginia and a duly elected member of the 105th Congress. Senator Byrd's current term of service will expire on January 3, 2001.

6. Plaintiff Mark O. Hatfield is a Senator from the State of Oregon. Senator Hatfield has represented the State of Oregon for five consecutive terms, beginning in 1967. His term of service will expire, and he will retire from the Senate, at noon, January 3, 1997.

7. Plaintiff Carl Levin is a Senator from the State of Michigan and a duly elected member of the 105th Congress. Senator Levin's current term of service will expire on January 3, 2003.

8. Plaintiff Daniel Patrick Moynihan is a Senator from the State of New York and a duly elected member of the 105th Congress. Senator Moynihan's current term of service will expire on January 3, 2001.

9. Plaintiff David E. Skaggs is a Representative from the Second Congressional District of Colorado and a duly elected member of the 105th Congress.

10. Plaintiff Henry A. Waxman is a Representative from the Twenty-Ninth Congressional District of California and a duly elected member of the 105th Congress.

11. Defendant Franklin D. Raines is the Director of the Office of Management and Budget, sued in his official capacity. In his official capacity, defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Act.

12. Defendant Robert E. Rubin is the Secretary of the Treasury, sued in his official capacity. In his official capacity, defendant Rubin is responsible for executing the President's cancellations of "limited tax benefits" under the Act and for executing and enforcing the tax laws of the United States.

The Line Item Veto Act

13. The Act provides that the President may, immediately, or within five calendar days (excluding Sundays), after signing a bill into law pursuant to Article I, section 7, of the Constitution, "cancel" any dollar amount of "discretionary budget authority (i.e., appropriations), any item of new direct spending, or any "limited tax benefit" contained in that law. The Act defines "cancel" to mean "rescind" in the case of an appropriation, and "prevent . . . from having legal force or effect" in all other cases. With respect to appropriations, the Act permits the President to cancel any amount stated in the law itself and also any amount separately stated in any table, chart, or explanatory text in the statement of managers or in any governing committee report accompanying the law. The Act requires that the President determine that the cancellation will reduce the Federal budget deficit, will not impair government functions he deems "essential," and will not "harm the national interest," but the Act does not require any other determination.

Injuries

14. The Act directly and concretely injures the plaintiffs, in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting the plaintiffs of their constitutional role in the repeal of legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Claim for Relief

15. The Act grants the President the power to cause some parts of a bill that has passed both Houses of Congress and been signed by him to be law, while canceling other parts of the bill and returning them to Congress. The Act grants this authority by permitting the President to sign a bill and then instantly (or within 5 days) and unilaterally negate the legal effect of his signature with respect to some parts of the bill by signing and transmitting a message to the Congress canceling those parts. Whether the Act is viewed as granting the President a unilateral power of line-item revision of bills that have been presented for his signature, or as granting him a unilateral power to repeal portions of duly enacted laws, the Act grants powers to the President that contravene the constitutional process for making federal law.

16. Article I of the Constitution provides a "single, finely wrought and exhaustively considered procedure," *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983), for making or changing federal law. It vests all federal legislative powers in a Congress comprised of two Houses. It requires that any bill must pass by majority vote in both the House and the Senate before it may become a law. The Presentment Clause (Art. I, sec. 7, cl. 2) then requires that a bill, before it becomes a law, shall be presented to the President, and it gives the President only three choices with respect to a bill presented to him: to "approve" the whole bill and sign it; to "return" (i.e., veto) the whole bill; or to allow the whole bill to become law without his signature. The requirement of bicameral passage and presentment to

the President applies to the repeal, as well as enactment or amendment, of provisions of law.

17. The Act violates Article I. The Act unconstitutionally expands the President's power, with respect to certain bills presented to him, by authorizing him to "approve" a bill and sign it into law and, from an instant up to five days later, disapprove and "return" parts of the bill, so that the parts of the bill disapproved by the President do not have the force and effect of law. The Act also violates the requirements of bicameral passage and presentment by granting to the President, acting alone, the authority to "cancel" and thus repeal provisions of federal law.

Prayer for Relief

Wherefore plaintiffs pray

(1) For a declaratory judgment that the Act is unconstitutional and that any cancellations under the Act are invalid.

(2) For reimbursement of their costs in this action, and for such other relief as the Court may deem appropriate.

Respectfully submitted,

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MICHAEL A. CARVIN
(DC Bar No. 366784)

/s/ LLOYD N. CUTLER (LRC)
/s/ LOUIS R. COHEN
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Date: January 2, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001(TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

INDEX OF LEGISLATIVE HISTORY MATERIALS

Plaintiffs hereby lodge with the Court the following legislative materials all of which are public documents.

Bills

1. H.R. 2, 104th Cong., 1st Sess. (1995)
2. S. 4, 104th Cong., 1st Sess. (1995)
3. S. 14, 104th Cong., 1st Sess. (1995)

Reports

4. H.R. Rep. No. 11, 104th Cong., 1st Sess. (Jan. 27, 1995)(Part 1)
5. H.R. Rep. No. 11, 104th Cong., 1st Sess. (Jan. 30, 1995)(Part 2)
6. S. Rep. No. 9, 104th Cong., 1st Sess. (1995)
7. S. Rep. No. 10, 104th Cong., 1st Sess. (1995)
8. S. Rep. No. 13, 104th Cong., 1st Sess. (1995)
9. S. Rep. No. 14, 104th Cong., 1st Sess (1995)
10. H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. (1996)

Hearings

11. *Line-Item Veto: Joint Hearing Before the Comm. on Gov. Reform and Oversight, House of Reps. and Comm. on Gov. Affairs, Senate*, 104th Cong., 1st Sess. (Jan. 12, 1995)
12. *Line-Item Rescission Authority: Hearing on S. 4 and S. 14 Before The Comm. on the Budget*, 104th Cong., 1st Sess. (Jan. 18, 1995)
13. *The Line-Item Veto: A Constitutional Approach, Hearing Before the Subcomm. on the Constitution, Federalism and Property Rights of the Comm. on the Judiciary*, No. 478, 104th Cong., 1st Sess. (Jan. 24, 1995)
14. *S. 4 and S. 14, Line Item Veto, Hearing Before the Comm. on Gov. Affairs*, No. 391, 104th Cong., 1st Sess. (Feb. 23, 1995)

Floor Consideration

15. 141 Cong. Rec. S.173-76 (Jan. 4, 1995) (daily ed.)
16. 141 Cong. Rec. S.692 (Jan. 10, 1995) (daily ed.)
17. 141 Cong. Rec. H.1078-1142 (Feb. 2, 1995) (daily ed.)
18. 141 Cong. Rec. H.1168-91 (Feb 3, 1995) (daily ed.)
19. 141 Cong. Rec. H.1225-64 (Feb. 6, 1995) (daily ed.)
20. 141 Cong. Rec. S.4002, 4004, 4074-89 (Mar. 16, 1995) (daily ed.)
21. 141 Cong. Rec. S.4125-45 (Mar. 17, 1995) (daily ed.)
22. 141 Cong. Rec. S.4153-96 (Mar. 20, 1995) (daily ed.)

23. 141 Cong. Rec. S.4212-60 (Mar. 21, 1995) (daily ed.)
24. 141 Cong. Rec. S.4295-4358 (Mar. 22, 1995) (daily ed.)
25. 141 Cong. Rec. S.4409-87 (Mar. 23, 1995) (daily ed.)
26. 141 Cong. Rec. S.4522-23 (Mar. 23, 1995) (daily ed.)
27 141 Cong. Rec. S.4529 (Mar. 24, 1995) (daily ed.)
28. 141 Cong. Rec. S.4544-4545 (Mar. 24, 1995) (daily ed.)
29. 141 Cong. Rec. S.4598-4599 (Mar. 24, 1995) (daily ed.)
30. 141 Cong. Rec. S.8717-19 (Mar. 24, 1995) (daily ed.)
31. 141 Cong. Rec. S.4601 (Mar. 24, 1995) (daily ed.)
32. 141 Cong. Rec. H.3740 (March 24, 1995) (daily ed.)
33. 141 Cong. Rec. H.5090-97 (May 17, 1995) (daily ed.)
34. 141 Cong. Rec. S.8201-03 (June 13, 1995) (daily ed.)
35. 141 Cong. Rec. S.8717-19 (June 20, 1995) (daily ed.)
36. 141 Cong. Rec. S.10331-33 (July 20, 1995) (daily ed.)
37. 141 Cong. Rec. S.10916-18 (July 31, 1995) (daily ed.)
38. 141 Cong. Rec. H.8605-08 (Sept. 7, 1995) (daily ed.)
39. 141 Cong. Rec. H.10773-79 (Oct. 25, 1995) (daily ed.)
40. 141 Cong. Rec. S.2925 (Mar. 27, 1996) (daily ed.)
41. 141 Cong. Rec. S.2929-95 (Mar. 27, 1996) (daily ed.)

42. 141 Cong. Rec. S.3026-29 (Mar. 27, 1996) (daily ed.)
43. 141 Cong. Rec. S.3150-51 (Mar. 28, 1996) (daily ed.)
44. 141 Cong. Rec. H.2971-3028 (Mar. 28, 1996) (daily ed.)

President's Signing Statement

45. Statement by President William J. Clinton, Upon Signing S.4 (Apr. 9, 1996).

Respectfully submitted,

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Date: January 27, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET. AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET. AL., DEFENDANTS

DECLARATIONS OF SENATOR ROBERT C. BYRD, SENATOR MARK O. HATFIELD, SENATOR CARL LEVIN, SENATOR DANIEL PATRICK MOYNIHAN, REPRESENTATIVE DAVID SKAGGS AND REPRESENTATIVE HENRY A. WAXMAN

Pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, plaintiffs hereby submit the declarations of Senator Robert C. Byrd, Senator Mark O. Hatfield, Senator Carl Levin, Senator Daniel Patrick Moynihan, Representative David Skaggs, and Representative Henry A. Waxman.

Respectfully submitted,

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Counsel for Plaintiffs

Date: January 27, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET. AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET. AL., DEFENDANTS

DECLARATION OF SENATOR ROBERT C. BYRD

Robert C. Byrd hereby deposes and says pursuant to 28 U.S.C. § 1746:

1. I am a United States Senator from West Virginia and one of the plaintiffs in this action.

The Basis of My Statements

2. My service in the Congress began in the House of Representatives on January 3, 1953. After six years in the House I was elected to the United States Senate in 1958, for a term beginning on January 3, 1959. I have been reelected to the Senate six times, most recently in 1994, for a term that will expire on January 3, 2001. From the beginning of my service in the Senate until the adjournment sine die of the 104th Congress last October, I cast 14,584 recorded votes, many of which were on appropriations and other matters now governed by the Line Item Veto Act.

3. I have been a member of the Senate Committee on Appropriations since January 14, 1959. I have

chaired or have been the ranking minority member of subcommittees of the Committee on Appropriations. I chaired the full committee from 1989 through 1994, and I have been its ranking minority member since 1995. As a member of the committee, as a subcommittee chairman and as a subcommittee ranking minority member, and as chairman and as the ranking minority member of the full committee, I have participated in the process of achieving compromises within the Senate, between the Senate and the House, and with Presidents, a process that is fundamental to governance under our Constitution.

4. I have also been a leader in the United States Senate. Between 1967 and 1971 I served as Secretary of the Democratic Conference. From January 1971 through 1976 I served as the Democratic whip. I was the Senate majority leader from January 1977 through 1980, and again from January 1987 through 1988. I was the Senate minority leader from January 1981 through 1986. As a member of my party's leadership for 22 years I observed and participated in building and maintaining through compromise the coalitions of Members that are essential to legislation by multi-member Houses in a bicameral Congress. These observations were confirmed and strengthened by my experience in presiding over the Senate as its President pro tempore from January 1989 through 1994.

5. In addition to basing this declaration on these legislative experiences, there are four fundamental aspects of our Constitution which inform the judgments that I will describe.

First, representation in the Senate is based on the equality of each State of our Union. I, for example, represent a small state that lacks the population and wealth of many other states, but stands equal in the Senate to every other state. I am accordingly mindful, when I evaluate legislation that departs from the design of our Constitution, as I understand it, of the impact of a measure such as the Line Item Veto Act on my ability to protect the interests of my state and other small states in the manner in which I believe that the Framers intended.

Second, the Framers created a bicameral system in which the Senate, in contrast to most second chambers elsewhere, shares in the power to originate legislation (except for bills to raise revenue) and possesses the power to amend all legislation. This feature of the Senate deepens my concern about any legislation that would give to a President the ability to disassemble legislation by preferring, through the power of cancellation, the amendments of one House over the other.

Third, the Senate shares with the President, and is the only independent check upon, both the appointment power and the treaty power. There is a seamlessness in the Constitution's balance of power which means that a constitutional imbalance in the appropriations process, which in my judgment will result from the Line Item Veto Act, inevitably will imbalance other carefully proportioned relationships established by the Framers.

Finally, with particular regard to appropriations, my experience in both chambers has continually augmented my respect for the force of James Madison's observation, in Federalist No. 58, that the "power

over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." Because of the damage that the Act causes to the constitutional design for the enactment of appropriations legislation, I will focus in this declaration on that feature of the Act.

The Application of the Act to Appropriations

6. In the following five paragraphs, I will describe how the Line Item Veto Act applies to appropriations.

7. First, to have the authority to cancel an appropriation (which the Act describes as any dollar amount of discretionary budget authority) the President must first sign an appropriation bill or joint resolution into law. This requirement appears in section 1021 of the Congressional Budget and Impoundment Control Act of 1974, as added by the Line Item Veto Act. The President loses this new cancellation power if he exercises his right to veto a bill and if that veto is overridden, or exercises the right to allow a bill to become law after ten days (Sundays excepted) without his signature. I am principally concerned about the damage that the Act causes to the role of the Congress in the legislative process. But I also addressed the Senate about what I described, and believe, to be this "very peculiar feature of the law," which, as I told the Senate "puts some pressure on a President not to exercise his constitutional right of veto which is set forth in section 7 of article I of the Constitution of the United States." In my view, this will make the President "a

super legislator. It will discourage him from using his veto powers to veto an entire bill, and encourage him to try to 'fix' legislation with which he does not fully agree by canceling only portions of the bill." Congressional Record, 104th Cong., 2d Sess., p. S2944 (March 27, 1996). The damage which the Act causes to the constitutional role of the Congress, and its Members, is thus not the only damage it causes to our constitutional system. In this regard, I also spoke (at, for example, pages S2943 and S2944 of that day's Record) and have considerable concern about the impact on the independence of the Judiciary of the Executive's power to single out for cancellation appropriations to that Branch.

8. The President is given five days (excluding Sundays) to send a message to Congress which by itself, without approval of the Congress, cancels an appropriation that fleetingly appeared to have become law. At page 22 of their report, the conferees on the Act described their intention "that the President's cancellations be made as soon as possible after the enactment of the law," referring to appropriations and other laws that would be subject to cancellations. They advised the Congress that the sole purpose of the five day period is to enable the Administration to prepare the paperwork that must be submitted to the Congress. There is no intention, or time, for the President to gain any experience or insights in the course of implementing an appropriation. The procedure of the Act ensures that the President acts only on the basis of his disagreement with portions of a bill as it was presented to him. There are, of course, important occasions when the Congress calls upon the President, in a law that it enacts, to make judg-

ments about facts that occur after the law has been passed. In the area of foreign policy, we often want the President to be able to respond to new facts which he learns through his ambassadors and other sources of information. There are times in which we also confer on the President flexibility to respond to changing economic events. But we have never to my knowledge given to the President, and I believe cannot by simple law do so consistent with the Constitution, a power, over and above his constitutional veto power, to nullify our Acts or portions of them for the sole reason that he disagrees with them.

9. Section 1026(7) defines the phrase "dollar amount of discretionary budget authority," which is of great importance in understanding the reach of the President's new power to cancel appropriations. Not surprisingly for an act that is entitled a Line Item Veto Act, the first element of the definition includes the entire dollar amount of budget authority specified in an appropriation law. It also includes amounts required to be allocated by a specific provision in an appropriation law even in the absence of a specific dollar figure in the law.

10. That, however, is only part of the President's new cancellation power. Section 1026(7) (A) (ii) also empowers the President to reach into congressional committee documents that are never presented to any President and cancel amounts "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law." At page 32 of their report, the conferees on the Act candidly explained that through this provision "Congress is choosing to use those documents as a means of

allowing the President increased discretion to reduce dollar amounts of discretionary budget authority provided in an appropriation law." But, as I described to the Senate (at page S2939 of the Congressional Record for March 27, 1996), a "bill goes to the President for his signature or veto. This conference report does not go. He never sees it." The committee provision allows administration officials to advise our Chief Executive, " 'Mr. President, there is a chart in the conference report on page 27, and you will find in that chart a certain item for certain States or certain regions of the country,' and he can say, 'Rescind them.' "

11. There is more. For example, as the conferees noted at page 33 of their report, the definition section of the Act enables the President to "look through" an appropriation law to an authorization law that mandates an expenditure. Thus, under section 1026(7)(A)(iii) of the Act, the President effectively may nullify authorization acts as well as appropriation acts by canceling budget authority "required to be allocated for a specific program, project, or activity in a law (other than an appropriation law) that mandates the expenditure of budget authority from accounts, programs, projects, or activities for which budget authority is provided in an appropriation law."

12. The President can also effectively nullify authorization acts by any cancellation that causes the zero funding of any project, program, or even department of the Government, and the cancellations may reach into any Branch, including the Legislative and Judicial Branches. What is at stake here is potentially far more than whether a particular dam or bridge is economically justified, or may be achieved

more frugally, although such issues may arise and be of great significance to the communities involved. Rather, the stake here also includes fundamental policy debates, which could range (looking at contemporary examples) from missile defense to legal services for the poor, in which a presidential cancellation power will enable one President or another to negate or rewrite underlying legislative policy.

13. Once the President acts the appropriation is canceled. The President's power of negation under the Act is even stronger than the qualified negative given by the Framers to the President under the Constitution, because at least under the Constitution only one formidable step, obtaining a two-thirds vote in each House on a returned bill is required to repass it. Instead, under the Act the Congress must act twice, first passing new legislation to disapprove the President's cancellation, and then overriding the President's veto of the disapproval bill. Based on all my experience, I believe that, except in rare circumstances, the Act gives to the President the functional equivalent of an absolute veto power.

The Budget Calendar for 1997

14. In the next three paragraphs, I will describe the formal budget calendar for 1997, indicating in general the variations to which it is subject, as a predicate for my judgment that the Act will have a significant impact in advance of the President's use of it to cancel any appropriation.

15. Section 300 of the Congressional Budget Act of 1974 establishes this timetable for the congressional budget process in a fiscal year:

On or before:	Action to be completed:
First Monday in February	President submits his budget.
February 15	Congressional Budget Office submits report to the Budget Committees.
February 25	Committees submit views and estimates to Budget Committees.
April 1	Senate Budget Committee reports concurrent resolution on the budget.
April 15	Congress completes action on concurrent resolution on the budget.
May 15	Annual appropriation bills may be considered in the House.
June 10	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriation bills.
October 1	Fiscal year begins.

The actual timing of events preceding the beginning of the new fiscal year is subject to some variation, including importantly the congressional

timetable for reconciliation legislation, which may include direct spending and tax matters.

16. The annual work of the Committees on Appropriations, in 1997 as in previous years, will begin in earnest when the President's budget, with supporting agency justifications, is submitted to Congress. The President's budget is now due to be submitted by February 6, 1997. Subcommittees of the two Committees on Appropriations will begin full hearing schedules in February to hear testimony from departmental and agency officials. The timing of the annual congressional budget resolution will then have an important bearing on the precise steps that follow. The budget resolutions, among other matters, will set aggregate spending—ceilings for budget authority and outlays, and distribute that authority among 19 functional categories. The annual resolutions will also distribute total budgetary authority among committees of jurisdiction in the two Houses, including the Senate and House Committees on Appropriations. With those allocations, the two appropriations committees will distribute budget authority and outlays among their subcommittees, and the process of marking up appropriations bills will begin. Floor activity will begin in the House in May and June, and may extend into July. Formal Senate activity (building on months of preparation) in marking up bills will begin when they are received from the House. Thus, by late spring and certainly by early summer, votes will be cast first at the committee level in each House, and then on the floors of the two chambers. Some conference committees to reconcile the bills of the two Houses may meet and report prior to the Congress' August recess. In the

main they will meet and report throughout September, during which month votes on final passage of appropriations bills will occur in both chambers in order to complete action, when possible, before the beginning of the fiscal year on October 1.

17. Well before October 1, recent appropriations history indicates that probably as early as March or April of this year, the Congress is expected to act on supplemental appropriations. Thus Members will quite soon begin to cast votes on legislation governed by the Line Item Veto Act.

Injuries Caused By the Line Item Veto Act

18. In my judgment, the Line Item Veto Act will significantly alter the meaning of the votes that I and other Members of the Senate, and also of the House, will cast on the final passage of appropriation bills. It has always been the case, on votes preliminary to final passage, that Members of Congress understand that the shape of a final bill is subject to further consideration, perhaps within the Members' respective chambers, or in negotiations between the two Houses, which may include negotiations with the Administration over whether the President will exercise a veto under Article I, section 7 of the Constitution. But a vote on final passage of a measure, for example a conference report on an appropriations bill, is different. Until the Line Item Veto Act, votes on final passage have not been steps in negotiations but rather acts of constitutional significance. For Members voting in the affirmative, that vote had previously entailed an action, by each supporting Member and by that Member's chamber, which enabled each and every element of that bill to become a

law, not because every Member necessarily endorsed each element of it, but because the totality of the bill warranted affirmation. Thus, in casting their votes on final passage, Members often have accepted provisions with which they disagree, in the interest of securing passage of provisions that they support. The Line Item Veto Act alters the meaning of final votes, because each of them is subject to the President's power to refashion the final product in a way that no longer reflects the totality of the bill upon which the votes of Members had been predicated. With the Line Item Veto Act, Members will be voting on bills the final contents of which will be determined by presidential action subsequent to their votes.

19. Consequently, whenever a bill containing one or more items subject to presidential cancellation under the Act is presented for a vote on final passage in the Senate, the Act changes the discharge of my constitutional responsibilities and the legal effect of my vote:

a. Under the Constitution, prior to January 1, 1997, whenever I voted for a bill, I knew that my vote could be counted only toward having that exact bill be law, with all of its provisions and only those provisions, and that if it passed the House and Senate it would have operative effect as law only in exactly the form in which I voted for it. If any revision whatsoever were made in the bill after I voted, the revised bill could not become law without passing the Senate in the revised form, and I would have another opportunity to consider the bill and cast a vote.

b. Under the Act, however, whenever I vote for a bill that contains any item subject to presidential cancellation, I am no longer voting for the whole bill

and only that bill. I am voting, instead, to give the President a menu from which he may choose the items that will have operative effect as law and the items that will not. I am no longer exercising the judgment that I believe the Constitution calls on me to exercise: whether the whole bill is in the best interests of the Nation.

c. These changes in the nature of the decision I am required to make in deciding how to vote, and in the legal effect of what I have done when I cast a vote, will occur early and throughout this and subsequent sessions of Congress each of the many times that I vote on passage of a bill with vetoable items.

20. Because the Act profoundly alters the meaning of final votes, the Act will markedly encumber the process of compromise, a process that is fundamental to the functioning of a bicameral legislature consisting of two Houses composed according to different electoral principles. Until the Line Item Veto Act, every Member or state delegation within the two Houses, could be assured of the durability of their compromises on final passage, at least until the Congress reconsidered a bill if it was returned by the President. Also, the fundamental precept that produced the Great Compromise between populous and small states at the Constitutional Convention—that the Senate would be composed on the principle of equality of states, and that no legislation may be completed absent the concurrence of the two Houses to the same Act—is endangered by the President's unilateral power to reformulate legislation. This will especially burden the small States whose limited membership in the House will place them at a special

disadvantage in securing the passage of disapproval legislation.

21. The Act will have an impact even prior to the casting of votes on final passage of appropriations legislation. By fundamentally changing the ground rules for the enactment of legislation, the Act introduces a new element in the relationship of governmental powers, beyond the need of Members to obtain a majority within a House, or of their House to obtain bicameral agreement, or of the Congress to obtain the President's approval of a statute as a whole. This new element is the power of the Executive to shape appropriations legislation through the potential of applying the cancellation authority. Furthermore, the object of that power need not be limited to appropriations, as it just as likely that the Executive's new authority over spending and taxes may be used to secure approval of appointments, treaties, or other legislation. The power may also be used to stifle criticism of the Executive Branch, and thereby deprive the Nation of the vigorous oversight that is so often needed.

22. In a passage recorded in Madison's Notes, Benjamin Franklin recounted on June 4, 1787 for the Constitutional Convention his experience "under the proprietary Government of Pena." with an absolute Executive veto. Franklin told the Convention:

> The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation. was always made a condition; till at last it became the regular practice, to have orders in his favor on

the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter.

An unrestrained veto power would be, in Franklin's words, "a mischievous sort of check," that would lead to "a complete subjection to the will of the Executive." While I have no fear that Presidents will use their newly minted veto power for any venal purpose, I also have no doubt, based on everything that I have learned and observed about Congresses and Presidents, that power will be used once it is freed from restraint. From our first Congress until the convening of this Congress, our Presidents, because the Convention had crafted a carefully balanced provision for the exercise of presidential power to sign or conditionally negative bills in their entirety, have been required to weigh the good and the bad as they see it, just as Members of Congress must do on the final passage of legislation, and make a broad determination about how the balance comports with the public interest. The Line Item Veto Act liberates Presidents from that restraint which was essential to the Framers' design and, therefore, in my judgment causes great harm to our system of separated powers.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 24, 1997.

/s/ ROBERT C. BYRD
ROBERT C. BYRD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET. AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET. AL., DEFENDANTS

DECLARATION OF MARK O. HATFIELD

DECLARATION OF MARK O. HATFIELD

Mark O. Hatfield hereby deposes and says pursuant to 28 U.S.C. 1746:

1. I am one of the plaintiffs in this action.

2. For thirty years, between January 3, 1967 and January 3, 1997, I was a United States Senator from Oregon. For twenty-five of those years, from February 1972 until my retirement, I served on the Senate Committee on Appropriations. I was chairman of the Committee for eight years (1981 through 1986, and 1995 through 1996), and was its ranking minority member for eight years (1987 through 1994). I also served in leadership positions as either chairman or ranking minority member of the Energy and Water Subcommittee of Appropriations from February, 1972 to January, 1995, and was chairman of the

Transportation Subcommittee of Appropriations from January, 1995 to January, 1997.

3. I became a plaintiff in this action even though at the time of filing the complaint only one day remained of my Senate service. I did so because of my conviction that each day of the Line item Veto Act's existence diminishes the authority and responsibility of Members of Congress, and grievously damages the constitutional system of separated powers. As I described to the Senate on March 22, 1995 (in remarks recorded at pages S4328 and S4329 of the Congressional Record for that day), this is a constitutional and not a partisan issue. I related that day, and believe today, that the Act abdicates to the President authority that reaches far beyond the question of "pet projects" that Members might insert in appropriations bills, and will allow Presidents of either party effectively to eliminate funding for whole departments or defense projects (no matter what my individual views on those might be) that the Congress in the exercise of its constitutionally conferred power of the purse has deemed necessary for the common good.

4. I am aware that the defendants in this action have moved to dismiss it on the ground that the injury to Members of Congress will be speculative, and that in their view the case is premature, until the President uses his new line item authority and the Congress fails to enact legislation that disapproves that use. Based, however, on my twenty-five year experience in negotiating compromises concerning and shepherding to passage appropriations bills, I can aver that the Line Item Veto Act will have an immedi-

ate and pervasive impact on the formulation of legislation.

5. I join my fellow plaintiffs in their assessment, based on their long experience in the daily conduct of the public's legislative business, of the reality that power is used, whether silently or brashly, by those who possess it, and that those who are the potential objects of power will likely conform their behavior to the possessors of it. In the years that I was privileged to take part in the appropriations process of the Congress, our work was guided by the awareness that the Founders gave our Chief Executive an important but limited constitutional veto power and that our product would be subject to that power. But there was always a reason for the President to be restrained in the exercise of that power, because the President needed to assess whether for any particular piece of legislation there was more that he favored than disfavored. By freeing the President from that balancing requirement, the Line Item Veto Act changes the reality of the legislative process, not at some future date, but now and on every day that Members must consider how to reconcile the competing interests that are pressed upon them.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January *22*, 1997.

/s/_____
Mark O. Hatfield

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DECLARATION OF CARL LEVIN

Carl Levin hereby deposes and says pursuant to 28 U.S.C. Section 1746:

1. I am the senior Senator from the State of Michigan and one of the plaintiffs in this action. I have served as a Senator from Michigan continuously since January 3, 1979, and was reelected to a fourth term on November 5, 1996. My present term will expire on January 3, 2003, and will include six of the eight years in which, by its terms, the Line Item Veto Act (hereafter, "the Act") is intended to be in effect.

2. For the past nine Congresses I served on the Committee on Armed Services, the Committee on Governmental Affairs, and the Committee on Small Business. In the 105th Congress, I am serving on these same committees as well as the Select Committee on Intelligence. As the most senior Democrat

on the Armed Services Committee, I hold the position of Ranking Minority Member on that committee.

3. As a Member of the Senate for 18 years, I have worked and voted on hundreds of bills providing for appropriations direct spending and limited tax benefits as defined by the Act. I have similar duties in the 105th Congress. Among my responsibilities are direct spending programs that are within the jurisdiction of the committees on which I sit, including military and civilian retirement programs. Also, as explained at page 33 of the Conference Report on the Act, the President, in certain circumstances, is empowered to "look through" appropriations acts to the related authorization acts, in selecting items and amounts to cancel. The conference cited as an example a provision of the National Defense Authorization Act, legislation within the jurisdiction of the Armed Services Committee.

4. It has been my experience that as soon as a Congress begins, Members start developing, drafting and debating legislation. At each step of the way, even before a bill is introduced, we Members make decisions about what we can support, what we must oppose, and what compromises we can accept. These decisions are part of the legislative process and are shaped by discussions and negotiations with fellow Senators, Members of the House, Administration officials and the President and Vice President. Such negotiations and the compromises that flow from them are an integral part of our duties as Members. These negotiations and compromises, which start with the beginning of a Congress and continue throughout the life of the Congress, are central to the way we conduct our work as legislators.

5. Bills, resolutions, treaties and nominations on which the Senate votes are, and I believe will inevitably continue to be, the product of the negotiation process I have previously described. Legislation that Congress sends to the President is invariably a package of dozens, often hundreds, of decisions that are the product of individual negotiations and compromises made throughout the course of the legislative process. For the past 18 years, I have performed my legislative responsibilities with the knowledge and confidence that the legislation we Members present to the President for signature or veto must be signed or vetoed as a whole rather than in parts. This requirement provides certainty upon which I base my conduct as a legislator and the votes I cast.

6. My ability to represent the interests of the people of Michigan in the negotiations and decisions required by the legislative process is significantly impaired by the Line Item Veto Act for the following reasons:

A. Whether or not the President ever in fact cancels an item under the Act, while the Act is in effect, I will no longer have the certainty that the results of my day to day negotiations and decisions, if included in legislation passed by both houses of Congress and presented to the President, will be included in the final legislation that will be permanent law unless vetoed by the president. I can no longer affirm to my constituents that once a particular provision of importance to them is included in legislation presented to the President such pro-

vision will be permanent law unless vetoed by the President.

B. Over the past 18 years there have been many occasions when I have supported one or more provisions of a bill containing appropriations, direct spending or tax benefits but have voted against the bill on final passage, because I have opposed even more strongly other provisions in the legislation. Similarly, it is not uncommon for me to question or oppose one or more provisions of a bill containing appropriations, direct spending, or tax benefits but to vote for the bill on final passage, because I support even more strongly other provisions in the legislation.

a. I will soon, and inevitably, be in a circumstance in which I vote for a bill on final passage that is subject to the Line Item Veto Act and that contains one or more provisions which I support and which have been the result of various negotiations. When that bill is presented to the President, the President will have the power to approve it while canceling the provision or provisions which I concluded had warranted my affirmative vote for the entire bill. If the President cancels one or more of those provisions, that cancellation would change the effect of my vote under the Constitution. Rather than giving legal effect to the combination of provisions which has been negotiated through both houses of Congress, some of which I support and others I question or oppose, following the President's action my vote will give effect to provisions in a bill that I would not have supported in the absence of those that I did. So I would have, under the Act, helped enact a law I would have opposed had I been able to know its contents.

b. In addition, where a vote in the Senate on final passage of a bill is close, one provision in the bill can make the difference with respect to the bill's passage or defeat. If passage of a bill depends upon inclusion of a particular provision which the President later cancels under the Act, then we as Members of Congress will have enabled the enactment of a law that we would not have otherwise presented as legislation to the President, and the legislation that we did present will not match the legislation which remains in effect after the President's cancellation. In short, the legislation which we in Congress approved and presented will not be the law, and the law would never have become law had we voted on the bill without the canceled items.

c. A number of times during my service in the Senate I have seen bills approved by a one-vote margin. In many cases, each Member who voted for such a bill is often viewed as being the critical, deciding vote. If the President were to cancel a key provision of such a bill that was the basis for my support of the bill, then my representative role would be undermined even more severely given the visibility and significance of the vote.

7. In fulfilling my responsibilities as a Member of Congress I take many actions that are of consequence to our nation and my constituents. When all is said and done, however, it is my power to vote on legislation that is most basic. Until now, I have voted on final passage of bills with the absolute certainty that the Constitution provides: that the entirety of our product, which results from compromises within and between two Houses, would either all become law, or

that none of it would be. The cancellation power of the Line Item Veto Act now removes the certainty in the legislative process that defined the meaning of my votes on bills providing for appropriations, direct spending and limited tax benefits and governs my conduct with respect to such legislation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 24, 1997.

/s/_____
Carl Levin

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DECLARATION OF SENATOR DANIEL PATRICK MOYNIHAN

Daniel Patrick Moynihan hereby deposes and says pursuant to 28 U.S.C. § 1746:

1. I am the senior United States Senator from New York and a plaintiff in this action. I am beginning my 21st year of service in the Senate. I am the Ranking Member (and former Chairman) of the Committee on Finance, on which I have served during my entire tenure in the Senate. The Committee on Finance is the Senate's tax-writing committee, and also has broad jurisdiction over legislation regarding the nation's health and income security programs, trade policies and debt management. I am also a member (and former Chairman) of the Committee on Environment and Public Works, which has jurisdiction over environmental policy and regulation, water resources, fisheries and wildlife, regional economic development, highway construction and maintenance,

public buildings, and public works (such as bridges and dams).

2. Additionally, I am a member (and former Chairman) of the Joint Committee on Taxation, which is comprised of five members of the Senate Finance Committee and five members of the House Ways and Means Committee. I have served on the Joint Committee for 10 years. Under the Internal Revenue Code, the Joint Committee is responsible for overseeing the operation, effects and administration of Federal tax laws, and for reporting (with recommendations if it deems advisable) to the House Ways and Means and the Senate Finance Committees. The Joint Committee is responsible under the Line Item Veto Act for identifying tax provisions subject to cancellation by the President, as described below.

3. My fellow plaintiff, Senator Robert C. Byrd, will be describing, in his declaration, the impact of the Act on the appropriation power of the Congress. I will do the same for direct spending and taxation, which are subjects of great importance to the committees on which I serve.

Direct Spending

4. The Act authorizes the President to cancel "any item of new direct spending." To help in understanding the reach of the Act with respect to direct spending, I shall point out several of the Act's features.

5. The Act defines "direct spending" to mean "(A) budget authority provided by a law (other than an appropriation law); (B) entitlement authority; and [(C)] "the food stamp program." 2 U.S.C. § 691e(5).

The Congressional Budget and Impoundment Control Act of 1974 defines "entitlement authority" as authority (including authority for loans and grants) to make payments "to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law." 2 U.S.C. §§ 622(9) and 651(c)(2)(C). In 1996, this category encompassed approximately 70 major direct spending programs, including Medicare and Medicaid. Although direct spending mainly involves payments to individuals, the President also will have authority to cancel payments to state and local governments.

6. Under the Act, the term "item of new direct spending" means "any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending" relative to the most recent budget baseline calculated by the Office of Management and Budget pursuant to section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985. 2 U.S.C. § 691e(8).

7. "New direct spending" might occur in the current year as a result of a change in law, but also may occur in a future year. To be subject to the President's cancellation power, legislation that provides for direct spending need not result "in a net increase" in spending, for, as described at page 36 of the Conference Report, "[a] provision of a future law that increases direct spending would be subject to the President's cancellation authority whether or not it is offset by another provision that reduces direct spending or increases revenues in the same law." Also at page 36, the conferees note that the President

may base cancellations on the "interactions among provisions in a new law, other provisions in that same new law, and underlying law." Therefore, the basis for the President's decision to cancel an item will not be limited to the particular spending measure presented to him.

8. The Act defines the power to "cancel" direct spending as the power "to prevent" it "from having legal force or effect." 2 U.S.C. § 691e(4)(B). The conferees explained, at page 22 of their report, that cancellation renders a direct spending provision "void, such that the obligation of the United States has no legal force or effect." For entitlements, the conferees explained, at page 29 of their report, cancellation would negate the government's "legal obligation to pay a benefit," and for food stamps it would "eliminat[e] the increase in food stamp obligations that would otherwise occur."

9. The Finance Committee has legislative jurisdiction in the Senate for most of the nation's large entitlement programs, including Social Security, Medicaid, Medicare, and welfare. Programs within the Finance Committee's jurisdiction account for over 80% of overall direct spending. The Environment and Public Works Committee has legislative jurisdiction over direct spending highway and transit programs.

10. An issue that arose as part of the Medicare debate in the last Congress (and which could arise again this year) illustrates the impact of the Act's direct spending provision. The issue concerned proposed reductions in Medicare payments to teaching hospitals. My interest in this issue derives from my conviction that our teaching hospitals, several of

which are located in New York, have played, and must be allowed to continue to play, a vital role in the advancement of medical science and health care in the United States. In the vetoed Balanced Budget Act of 1995, significant cuts were proposed in Medicare spending, including reductions in Medicare disproportionate share hospital payments (two-thirds of which are made to teaching hospitals) and in Medicare's direct and indirect medical education payments. As a result, a number of members of Congress were concerned that teaching hospitals would be adversely affected by the Medicare cuts. To help remedy this problem, a provision was added to the bill to establish a Teaching Hospital and Graduate Medical Education Trust Fund, and to provide greater Federal funding for graduate medical education. Both the Trust Fund and attendant increases in funding would be considered an item of new direct spending, and therefore subject to cancellation under the Line Item Veto Act.

11. When Medicare legislation next is considered in Congress, I will again support a similar item to protect teaching hospitals. Under the Line Item Veto Act, however, if that provision is passed by Congress and the President disagrees with the legislative judgment that teaching hospitals will be placed at risk by Medicare changes, he may cancel the Trust Fund provision immediately on signing the legislation containing the provision. He will be free to make his own legislative judgment about need for the Fund, and upset the balance struck by the Congress, even if that balance was necessary to achieve a majority in either or both houses. Indeed, the mere existence of this possibility will seriously encumber the process of crafting legislation capable of passing both houses.

I cite the Teaching Hospital Trust Fund only illustratively. What is certain is that similar problems inevitably will arise in the consideration of major entitlement legislation.

Limited Tax Benefits

12. Under the Act, the President may cancel in whole "any limited tax benefit." 2 U.S.C. § 691(a). The Act defines a "limited tax benefit" generally as any tax provision (including "a Federal tax deduction, credit, exclusion, or preference") that (1) loses Federal tax revenue in either the first fiscal year for which the provision is effective, or the five-year period beginning with the first fiscal year for which the provision is effective, (2) applies to 100 or fewer beneficiaries in any fiscal year, and (3) is not within a number of broad exceptions generally regarding whether similarly situated taxpayers receive the same tax treatment under the provision. 2 U.S.C. § 691e(9). The Act also defines a "limited tax benefit" to include any transition rule that will benefit 10 or fewer taxpayers in any fiscal year generally. Certain limited exceptions are provided.

13. As for new direct spending, cancellation is defined as preventing these measures "from having legal force or effect." 2 U.S.C. § 691e(4)(C). The conferees, at page 29 of their report, state that cancellation will authorize the President "to collect the tax that would otherwise not be collected or to deny the credit that otherwise would be provided."

14. With respect to any tax bill, the Joint Committee on Taxation is required to provide the conference committee with a statement listing all of the limited tax benefits, or a statement that the bill

contains none. The conference committee then may include all of the information provided by the Joint Committee as a separate section of the bill or exclude the information entirely. The identification of limited tax benefits in such a statement as part of the conference report is not subject to judicial review. If a statement from the Joint Committee is included in the conference report, the President may cancel only those limited tax benefits, if any, that are listed in the statement. If no statement from the Joint Committee is included, the President may cancel any items that he determines are limited tax benefits in the bill.

15. To illustrate the issues presented by this provision, I refer to the Stop Tax-exempt Arena Debt Issuance Act, legislation I originally introduced in 1996 to eliminate tax-exempt financing of professional sports facilities. I sponsored this legislation because I believe scarce Federal tax dollars can be better spent on education and other priorities. Even so, I recognized that a few localities had expended significant time and funds in planning professional sports facilities, in reliance upon professional advice that tax-exempt financing would be available. Thus, my bill provided transitional relief for those stadium projects that had progressed to a point at which it would have been inequitable to subject them to the changes proposed in the bill.

16. Under the Act, if fewer than 10 issuers of tax-exempt sports stadium bonds are covered by the bill's transition relief, the President may cancel the transition relief provision. In such a circumstance, the threat of a line item veto encourages either the omission of the transition relief, which could make the bill unfair and reduce its chances of enactment, or

the broadening of the transition relief more than is equitably necessary to cover more than 10 taxpayers and thereby fall outside the ambit of the Act. The latter alternative could cost significant revenue in the short run, which could also affect the viability of the entire bill.

The Immediacy of Our Injury

17. Defendants have moved to dismiss our complaint, arguing, among other things, that our claim of injury is "purely speculative." However, there is nothing speculative about how the line item veto power injures members of Congress, and the nature of this injury would not have been lost on the Framers. According to Madison's Notes of Debate in the Federal Convention, quoting Col. Mason on June 5, 1787, the Framers understood that the Executive, for example, would use an absolute power over legislation to "refuse its assent to necessary measures till new appointments shall be referred to him." That same day James Wilson observed, referring to the proposal for a qualified veto, that "[t]he Legislature would know that such a power existed, and would refrain from such laws, as it would be sure to defeat," and that the "silent operation" of the veto would achieve the Legislature's conformance to the President's wishes while allowing the actual veto to be "seldom" used.

18. The Framers would have understood, therefore, that line item veto authority would alter immediately, to the significant advantage of the President and the disadvantage of Members of Congress, the allocation of power between them.

19. The Framers would have understood a further truth based on their ample understanding of human behavior. As Madison described in Federalist No. 51, the Framers conceived "the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." How did they contrive to do this? The Framers took interest as a given and virtue as something to be acquired. "Ambition must be made to counteract ambition." From this we derive the central principle of the Constitution, the various devices which, in Madison's formulation, would offset "by opposite and rival interests, the defect of better motives."

20. For these "opposite and rival interests" to produce a workable Government, the Framers understood that "a compromise of . . . dissimilar interests and inclinations" would be necessary. In his last essay (Federalist No. 85) to the citizens of my state, in the great debate to secure their approval of the Constitution, Hamilton, speaking of the Constitution but in language equally applicable to legislation, observed: "The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices, as of the good sense, of the individuals of whom they are composed."

21. Yet under the Line Item Veto Act, the incentive to compromise, which is indispensable to our system of competing interests, has been dealt a blow that will be felt on each day of the Act's life. As I stated on the floor of the Senate on March 27, 1996 (at pages S2973-74 of the Record for that day):

> Mr. President, these compromises make major legislation agreeable and effective. Supposing a member with whom a chairman worked were asked to make a concession in return for an accommodation; supposing that member had to think: The minute this bill becomes law, that chairman will go to that President and say, "Take out that provision that was made for the Senator from Louisiana, because it was only done to get your bill by, Mr. President." You will not have that which makes legislation possible. You will not have that spirit of trust, which performance reinforces and creates the stability of our institutions. For if there is no trust, there will be no compromise, and if there is no compromise, there will be no Government—no stable Government.

22. I join and ascribe to the description in paragraph 19 of Senator Byrd's declaration regarding the effect of the Act on the votes that I and each of my colleagues will cast in this and subsequent Congresses with respect to items subject to the Act.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 24, 1997.

/s/_____

DANIEL PATRICK MOYNIHAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DECLARATION OF DAVID SKAGGS

David Skaggs hereby deposes and says pursuant to 28 U.SC § 1746:

1. My name is David Skaggs and I am one of the plaintiffs in this action. I represent the Second Congressional District of Colorado and have been a member of the House of Representatives since 1986. In 1991, I was appointed to the House Appropriations Committee where I serve on the Subcommittee on Interior and the Subcommittee on Commerce, Justice, State and the Judiciary. I also serve on the House Permanent Select Committee on Intelligence.

2. I am a plaintiff in this action because of my firm conviction that the Line Item Veto Act abridges the constitutional responsibilities assigned to the legislative branch and unconstitutionally attempts to expand the power of the Executive branch. I spoke against passage of the Line Item Veto Act on the House Floor on March 28, 1996, and voted against it. Article I, Section 7 of the Constitution vests all legislative

powers in the Congress and limits the President's role in legislation to either approving and signing a bill or returning it with his objections. These careful limitations were crafted by the Framers in part to guard against the accretion of power in the American president. The unilateral "repeal-power" purportedly granted to the President under the Line Item Veto Act may be appropriate for a monarchy but it is an affront to a system of representative democracy.

3. From my experience as a legislator, I believe the expanded powers granted the President under the Line Item Veto Act, have a great potential to be used to affect votes on other, non-appropriations matters. For example, in the 1980s, when Congress was debating whether to provide aid to the Nicaraguan Contras, if a member of Congress was seeking funding for a needed courthouse in his district, he might well have received calls from the White House saying, "Congressman, I notice you had some success in dealing with this need in your district. We are pleased at that, but we need your support on aid to the Contras." The not-so-subtle message would be, you vote on what we want or the President will cancel a benefit to your District. This assumed new power of the President thus subjects Members of Congress to a new and significant form of Executive Branch pressure and erodes the separation of legislative and executive powers.

4. The impact of the Line Item Veto Act is immediate. It will affect all attempts at bargaining and compromise in putting together an appropriations bill because Members will be aware that the President has the power to single out particular spending items for elimination. Negotiations over appropriations

bills begin as soon as the President submits his proposed budget in early February. On the Interior Appropriations subcommittee, we have hearings already scheduled starting in February. Starting March 4, outside witnesses from around the country will present testimony about federal funding for particular projects and programs. The Line Item Veto Act will loom over our deliberations as we must consider the White House position on each case.

5. I am informed that the Appropriations Committee will receive requests for supplemental appropriations for the current fiscal year in the next three or four weeks. These requests will deal with national security matters, disaster relief and forest fire fighting, and will require immediate attention by the Committee. Thus, it is very likely that negotiations, decisions and votes that are all subject to unique influence and pressure emanating from the Line Item Veto Act will have occurred even before this case is set for oral argument on March 21, 1997, and will certainly continue thereafter.

6. Because the President has the purported power under the Line Item Veto Act to pick and choose which projects to cancel up to five days after enactment of a law, he has been given the power to undo legislative compromises. As such, the Line Item Veto Act has made the President into a super-legislator permitting him to refashion legislation and consequently reduced the powers vested in each legislator under the Constitution to a commensurate extent. This new power has an immediate impact on negotiations over appropriations bills and on the votes that will occur on those bills.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 25, 1997.

/s/ DAVID SKAGGS
DAVID SKAGGS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

DECLARATION OF HENRY A. WAXMAN

Henry A. Waxman hereby deposes and says pursuant to 28 U.S.C. 1746:

1. My name is Henry A. Waxman, and I am one of the plaintiffs in this action. I represent the Twenty-Ninth Congressional District of California. I have been a member of the House of Representatives since 1975. I was Chairman of the House Energy and Commerce Committee's Subcommittee on Health and the Environment from 1979 through 1994 and its ranking Democrat in 1995 and 1996. In January 1997, I was elected to be the ranking Democrat on the House Government Reform and Oversight Committee.

2. My principal work in Congress has been devoted to health and environmental policy. I have participated in negotiations on scores of legislative measures with other House members and as a member of House/Senate conference committees.

3. An express purpose of the Line Item Veto Act is to provide the President with a tool to cancel spending measures. The law, however, gives the President authority to disregard the constitutional requirement that all legislative powers rest with Congress. It allows him to disrupt negotiated compromises achieved by Congress and to unilaterally cancel parts of legislative agreements immediately after he signs them into law. It allows him to make unilaterally a new, revised law that might never have received the support of the majority in either House of Congress.

4. The Line Item Veto Act's shift of power from Congress to the President is obvious in the review of the legislative history of virtually any piece of spending legislation Congress has passed. An illustrative measure, with which I had close experience, that comes vividly to mind is the Omnibus Budget Reconciliation Act of 1987. Negotiations on that legislation were particularly difficult to resolve and clearly demonstrate the problems the law poses and the dramatic transfer of power it gives the President.

5. In 1987, the House and Senate passed substantially different versions of that year's Omnibus Budget Reconciliation Bill. I was the principal sponsor of provisions in the House bill to expand Medicaid coverage for pregnant women and children and strengthen nursing home standards to address deficiencies reported in 1986 by the Institute of Medicine of the National Academy of Sciences. The Senate passed less sweeping Medicaid provisions than the House, and President Reagan strongly opposed provisions in both measures. Acting within his constitutional powers, the President advised that he

would veto any measure that contained provisions that were objectionable to the Administration.

6. After marathon negotiations, we finally reached a conference agreement on December 21, 1987, more than two months after fiscal year 1987 had ended. The President's veto threat required House negotiators to remove or dramatically scale back the Medicaid provisions that I had advocated. While I disagreed with the President's policies, I fully respected his right to use the veto power in the manner anticipated by the Framers. The agreement we reached was the result of hard compromises.

7. Had the Line Item Veto Act been in effect, these congressional negotiations and our ultimate consensus on Medicaid provisions would have been irrelevant. The President could simply have canceled them as new spending items. No matter what compromises the House and Senate made, and no matter what provisions were included in legislation that passed both Houses, the President could have item-vetoed the provisions I supported, while leaving provisions that I opposed but had acceded to in order to secure passage of the bill.

8. Thus, congressional consideration of new items of spending in the future could be essentially meaningless to the final outcome. A President will be able to remove the spending items he opposes, even though they are part of a larger compromise that helped make the final product possible. Further, he will be able to cancel them even when they are offset by other provisions in the legislation.

9. Our system of representative Democracy is predicated on the vesting of all legislative powers

in Congress. The Framers gave the President the important power of requiring the Congress to reconsider legislation, but they did not give to the President the power to rewrite laws on his own. In violating this allocation of powers, the Line Item Veto Act seriously disrupts the legislative process and diminishes the role of Congress.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 23, 1997.

/s/ HENRY A. WAXMAN
HENRY A. WAXMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

PLAINTIFFS' MOTION FOR LEAVE TO FILE LEGISLATIVE SUMMARY

Plaintiffs hereby move this honorable Court for leave to file the attached Legislative Summary ("Summary"). The Summary recounts the legislative history of the Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200 (the "Act"). The Summary is intended to assist the Court in reviewing the legislative history materials related to the Act, which will be separately deposited with the Court for its convenience. In conformance with this Court's Rule 108(m), plaintiffs have consulted with counsel for defendants and have been advised that defendants reserve their right to respond to this Motion.

Respectfully submitted,

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Date: January 27, 1997

LEGISLATIVE SUMMARY

HISTORY OF THE LINE ITEM VETO ACT OF 1996

1. The House of Representatives

On January 3, 1995, H.R. 2 was introduced and referred to the Committee on Government Reform and Oversight. *See* H.R. 2, 104th Cong. 1st Sess. (1995). The bill was a broad-ranging "enhanced rescission" line item veto, under which the President had 20 days after a bill is enacted to veto items which he disapproved. It entitled the President to "rescind all or part of any discretionary budget authority." § 2(a). His authority was not limited to items in the statute itself, but included identifiable items in the legislative history. The bill provided that any budgetary authority that is rescinded "shall be deemed canceled unless" the Congress overrides it, § 3(a)(1), and that "any provision of law *vetoed* under this Act . . . shall be deemed *repealed* unless . . . a rescission/receipts disapproval bill restoring that provision is enacted into law." § 3(a)(2) (emphasis added). In addition, it also authorized the President to "*veto* any targeted tax benefit" (one limited to a few persons), subject to the same two-thirds override. § 2 (emphasis added).

On January 12, 1995, the House Government Reform and Oversight Committee held a joint hearing with the Senate Government Affairs Committee, at which the only dissenting witness was Chief Judge Gilbert S. Merritt of the Sixth Circuit, who, as Chairman of the Executive Committee of the Judicial Conference, expressed concern about the policy implications of a presidential line item veto for appropriations for the judiciary. *See* H.R. Rep. No. 11, 104th Cong., 1st Sess. 13 (January 30, 1995) ("House Report"). A markup was held on January 25, 1995, and the bill was

reported favorably, with amendments, by a roll call vote of 30-11. *Id.* at 12.

There were several committee decisions of note. The period during which the President had the right to veto items was shortened from the original 20 calendar days (not including Saturdays, Sundays, or holidays), to 10 calendar days, not including Sundays. *Id.* at 2. The term "targeted tax benefit" was expanded somewhat so that the maximum size of the group of taxpayers whose benefits could be vetoed went from five in the bill as introduced to 100. *Id.* at 2, 26, 27. An attempt to exclude the judiciary was defeated by a vote of 17-29, *id.* at 21, and efforts to sunset the legislation were turned back by a vote of 17-22. *Id.* at 31, 35.

The House Report was clear about the purpose of H.R. 2: "to change the tilt of the game from one that favors spending to one that favors saving." *Id.* at 7. In discussing the problem which the President had in obtaining congressional approval of rescissions, the Report stated that the bill "reverses the burden. Presidential proposals will now become law unless Congress takes action to stop them." *Id.* at 9.

Several other references clarify how the bill was intended to work. Thus, the committee observed that its bill "strengthens the President's ability to rescind (cancel) appropriated funds. It also allows the President to *eliminate* targeted tax benefits . . . ." *Id.* at 8 (emphasis added). Although the report refers to the actions of the President as "recommendations" that various items "be terminated," the report confirms that no prior action by Congress is required since the "recommendations will automatically become law after a fixed period of time, unless Congress, during a designated review period, votes by bill

or joint resolution to disapprove." *Id*; *see also id.* at 10 (budget authority or targeted tax benefits will automatically be terminated after a fixed number of days unless Congress acts by a bill or joint resolution to disapprove the President's proposal); *id.* at 14 ("Any provision of law, as set forth in a President's special message, shall be deemed *repealed* unless a rescission/receipts disapproval bill restoring that provision is enacted into law.") (emphasis added).

Although line item veto supporters often referred to the experience of the states with the item veto, the House Report recognized that "H.R. 2 differs fundamentally from the kind of item veto authority granted to governors in 43 states." *Id.* at 11. Whereas state appropriations bills are highly itemized, federal laws are not, and the Committee sees "no reason to do so" because that would "add an undesirable rigidity to agency operations." *Id.* Instead, Congress could continue to appropriate with lump sums, and the President could "propose for reduction or elimination any dollar amount specifically identified in a bill or committee report or joint explanatory statement accompanying a conference report on that Act," so that the President would have "greater power and discretion than he would have with item veto authority." *Id.* at 12.

House floor consideration of the bill occurred on February 2, 3, and 6, 1995, 141 Cong. Rec. H.1078-1142; 1168-1191; 1225-1264 (daily ed.), and was generally less noteworthy for what was said than for the amendments that were offered and rejected.[1] Initially, two

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[1] Unless otherwise indicated, all references to floor debate are to 141 Congressional Record, daily edition, with a prefix of S. or H.

amendments were adopted unanimously. The first, offered by Representative Clinger, the Chairman of the Committee on Government Reform and Oversight, was intended to clarify that, although the bill permits the President to look to legislative history and thereby go behind appropriations bills, he "may not look to Office of Management and Budget (OMB) or agency justifications or other types of documents to rescind funds for programs not specified by Congress." H.1106. It was also intended to assure that the President "may only rescind dollar amounts, not bill language . . . [contrary to the practice] in some states [where] the Governor does have the power to actually effect [*sic*] statutory language." H.1106. Another amendment, sponsored by Representative Pelosi, was along similar lines and specified that the President may not "change any prohibition or limitation of discretionary budget authority set forth in any appropriations act." H.1107.

Most of the amendments offered were rejected. Representative Moran offered an amendment, comparable to the one that had been previously rejected in committee, to remove the authority to rescind budgetary authority for the judicial branch. H.1107. That amendment was rejected by a vote of 119-309. H.1115. Three separate efforts were defeated to broaden the authority of the President to cut back on tax benefits of various kinds. H.1116, H.1125, H.1168, H.1170, H.1235, H.1255. Two other attempts to alter the scope of the rescission authority were also turned back. Representative Skelton moved to limit the President's cancellation authority to $50 million of discretionary budget authority and to exclude "any program, project, or activity within the major functional category for national defense." H.1130. That amend-

ment was defeated by a vote of 52-362. H.1138. Representative Orton attempted to bring contract authority within the scope of the line item veto, H.1225-34, but that was defeated by a recorded vote of 65-360. H.1254. An effort was made to impose a sunset date of January 1, 2000, H.1139, but that, too, was strongly opposed by supporters and rejected by a vote of 153-258. H.1142.

The single most crucial vote was on an "expedited rescission" substitute offered by Representatives Wise, Stenholm, and Sprat. Expedited rescission would have established procedures for voting on a President's proposed rescission under the Impoundment Control Act of 1974, 2 U.S.C. § 688. As Representative Stenholm put it: "[t]he only question is, how much power do you wish to cede to a President. That is it." H.1176. Even though 342 Members of the House had voted for this approach in 1994, H.1171-72, H.1245, and even though there was no question as to the constitutionality of expedited rescission, H.1185, the House twice voted it down by margins of 167-246, H.1186, and 156-266. H.1242-56.

The final amendment, which was adopted without objection, created a mechanism for expedited judicial review. H.1138-39. It gave standing to Members of Congress, a hearing before a three-judge district court in the District of Columbia, direct appeal to the Supreme Court, and expedition in both Courts. The judicial review amendment was offered by Rep. Deal of Georgia, a strong supporter of the bill, who noted that "[s]ince we are proceeding in a statutory form for a line item veto and not a constitutional amendment, it should be obvious that until that constitutionality is clarified, it will be under a cloud." H.1138. In his prepared statement, he observed that "[h]ope-

fully, the procedure established by my amendment will result in a final resolution regarding the constitutionality of line item veto authority before the fiscal year 1996 appropriation bills are sent to the President." H.1139. His statement further noted that "[i]f my amendment for judicial review is not added to the bill, it is unlikely that the courts would consider the issue until the President exercises the line item authority." H.1139. His position was supported by Rep. Blute, another proponent, who observed that "this is a good amendment which simply ensures that any court challenge to H.R. 2 be considered on an expedited basis." *Id.* Congresswoman Collins, an opponent of the bill, also supported this amendment because it allows "a test case on this legislation constitutionally without having to wait for the President to use the line item veto authority this bill gives him." H.1139.

At the end of the lengthy debate, a vote to recommit was defeated, largely along party lines, by a vote of 185-241, H.1263, followed by an affirmative vote on final passage of 294-134. H.1264.

2. The Senate

In the Senate, there were two principal bills. S. 4, an "enhanced rescission" bill, was substantially the same as H.R. 2, except that it did not permit item veto of tax expenditures. S. 4 required a two-thirds override, allowed the President to reduce as well as eliminate items of budgetary authority, and was not limited to items appearing in an appropriations bill itself. *See* S. Rep. No. 9, 104th Cong., 1st Sess. (1995); S. Rep. No. 13, 104th Cong., 1st Sess. (1995).

The other vehicle, S. 14, was an "expedited rescission" bill, similar to the Stenholm, Wise, and Sprat

substitute rejected on the House floor, except that it also applied to new entitlements and to tax expenditures. *See* S. Rep. No. 10, 104th Cong., 1st Sess. (1995); S. Rep. No. 14, 104th Cong., 1st Sess. (1995). Both bills were referred jointly to the Committees on Budget and Governmental Affairs. On January 18, 1995, the Budget Committee, Chaired by Sen. Domenici, held hearings on both bills. In his opening statement, the Chairman stated that he preferred S. 14, and described S. 4 as involving a "maximum shift in power." *Line-Item Rescission Authority: Hearings on S. 4 and S. 14 Before The Comm. on the Budget, 104th Cong., 1st Sess.* 2 (1995).[2] In the words of its sponsors, S. 14 would have "guarantee[d] the President a vote on his rescission proposals while maintaining the delicate balance of power between the two branches on spending authority." S. Rep. No. 9 at 15 (additional views of Sen. Domenici).

Shortly thereafter, the Subcommittee on the Constitution, Federalism, and Property Rights of the Committee on the Judiciary held a hearing to consider two proposed constitutional amendments that would create a line item veto, S.J. Res. 2 and S.J. Res. 16. *See The Line-Item Veto: A Constitutional Approach: Hearings before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong., 1st Sess.

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[2] Those hearings were a follow-up to a hearing held on October 5, 1994, in the 103rd Congress. The record of that hearing assembles much of the prior legislative material relating to efforts to create a line item veto, either by statute or constitutional amendment. *See Legislative Line-Item Veto Proposals: Hearing Before the Comm. on the Budget*, 103rd Cong., 2d Sess.(1994).

(1995).[3] At that hearing, Senator Biden, who described himself as a supporter of a statutory line item veto, opposed a constitutional amendment because of its permanence, *id.* at 5, 6, 10, expressed his support for the concept of "separate enrollment," *id.* at 10, but strongly urged his colleagues to insist on a sunset provision. *Id.* at 10-11.

Appearing for the Administration was Assistant Attorney General Walter Dellinger of the Office of Legal Counsel at the Department of Justice, who stated that the President supported a "strong line-item veto" bill, in particular S. 4. *Id.* at 33. He expressed his opinion that S. 4 is "clearly constitutional" as "a very strong delegation of authority to the President . . . not to expend appropriated funds . . . ." *Id.* at 34. He recognized that the President's cancellation order "is final and what happens in Congress is that Congress then must vote a new bill to actually proceed with that funding, which the President can then veto. That is why S. 4 is a two-thirds bill." *Id.* When asked about the advisability of a constitutional amendment, he expressed reservations because of its permanence. *Id.* at 35.

He also stated quite clearly what he thought would *not* be constitutional. Citing what he called "a long tradition at the Office of Legal Counsel," and invoking the views of three of his predecessors in the Reagan and Bush Administrations, he stated that all

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[3] That Committee had previously held similar hearings on April 11, 1989, and June 15, 1994, and had collected a number of scholarly and other materials. *See, e.g., Line-Item Veto: The President's Constitutional Authority: Hearings Before The Subcomm. on the Constitution of the Comm. on the Judiciary*, 103rd Cong., 2d Sess. (1994).

of them "have agreed the President does not at present have that power constitutionally." *Id.* at 36. He also said that they all agreed that "Congress cannot literally give the President a line item veto power by statute, and that attempts that appear to literally give the President a line item veto by statute are also constitutionally invalid." *Id.* at 36; *see also id.* at 38.

On the issue of separate enrollment, he noted that "[a]s much as I regret saying so," it "also raises significant constitutional issues" under the Presentment Clause, or "at a minimum, it raises such complicated questions under the Presentment Clause that it is a foolhardy way to proceed because if we and all our predecessors are right, I think that which has to be presented to the House is the thing that passed the House and the Senate and that which passed the House and Senate is the bill they voted on final passage, not some little piece of it or a series of little pieces of it." *Id.* at 38.

In his prepared statement, Mr. Dellinger explored at greater length the constitutionality of S. 4. While defending "enhanced rescission" on the ground that it was a lawful delegation to the President of discretion over spending appropriated funds, he expressed doubts about the constitutionality of the provision dealing with targeted tax benefits because it purports "to authorize the President to 'veto' targeted tax benefits after they become law, thus resulting in their 'repeal.'" *Id.* at 49. He then observed that "use of the terms 'veto' and 'repeal' is constitutionally problematic [because Article I, § 7 of the Constitution] provides that the President only can exercise his 'veto' power before a provision becomes law." *Id.* He also observed that "the word 'repeal' suggests that the President is being given authorization to change

existing law on his own [which] arguably would violate the plain textual provisions of Article I, Section 7 of the Constitution, governing the manner in which federal laws are to be made and altered." *Id.*

Mr. Dellinger's method of avoiding these "constitutional shoals" would be to "recast" S. 4 so that it "eliminates the word 'veto' from the targeted tax benefit provision, and confers on the President the power to *suspend* (rather than 'repeal') such benefits." *Id.* These changes would "preserve the purpose of the provision" and "would place the targeted tax benefit provision on the same defensible constitutional footing as the provision regarding rescission of budget authority." *Id.*

On February 22, 1995, the Senate Budget Committee reported out S. 4 with amendments, but without recommendation. *See* S. Rep. No. 9, at 13. The Committee report makes clear that the President's rescissions "would remain in effect unless Congress passed a disapproval bill . . . . and overcame the President's veto of that disapproval bill," *id.* at 1 and that the Committee considered the authority under S. 4 to be either "rescissions or repeals." *Id.* at 5.

The Committee adopted two amendments. *Id.* at 8. The first, offered by Senator Domenici, added a sunset date of September 30, 2002 (§ 1114), and the other (§ 1113), offered by Senators Conrad and Snow, established a "lock box" to assure that any savings from Presidential rescissions would be devoted to deficit reduction and not spent for other purposes. Although he voted to report out the bill, Sen. Domenici expressed "serious reservations about S. 4" in his separate views because he believed that it would "delegate too much authority to the President over the control of the budget." *Id.* at 14. He also expressed his

concern that "[o]nly a Constitutional amendment can give the President the authority to delete items in spending bills and the Judiciary Committee has jurisdiction over the line item veto constitutional amenment." *Id.* at 16. Shortly thereafter, the Senate Governmental Affairs Committee also reported S. 4 as passed by the Budget Committee, without recommendation and with no further amendments. S. Rep. No. 13, at 6.

S. 14 was also reported out by both Senate Committees, also without recommendation. S. Rep. No. 10, at 9; S. Rep. No. 14, at 6. The Committee on the Budget made some small changes to the bill as introduced, but under both versions, the President's proposed rescissions would not take effect until Congress had affirmatively approved them. S. Rep. No. 14, at 7-11; S. Rep. No. 10, at 9. In addition, S. 14 would also apply to "targeted tax benefits" which, like in the House's version, were those limited to 100 or fewer persons. S. Rep. No. 10, at 14; S. Rep. No. 14, at 11.

S. 4 then went to the Senate floor where it was considered on March 16 (S.4074-89); March 17 (S.4125-45); March 20 (S.4153-96); March 21 (S.4212-60); March 22 (S.4295-58) and March 23 (S.4409-87). Almost immediately, it was announced that the "enhanced rescission" version of the line-item veto contained in S. 4, which had been reported out by both the Budget and Governmental Affairs Committees, and which was similar to the House-passed H.R. 2, would not in fact be the approach that the Senate leadership supported. S.4075. Instead, debate would be on a "separate enrollment" proposal, on which bills had been introduced. S.4075-76.

The separate enrollment substitute was introduced by Majority Leader Senator Dole. S.4188-89. Under

separate enrollment, once an appropriations bill passed both Houses in agreed upon form, the enrollment clerks would divide the unified bill into as many separate bills as there were separate items of spending, and those separate bills would each be presented to the President for his signature. In addition to the change in the basic form of the line item veto, the most significant changes from S. 4, as reported, were the additions of new targeted tax benefits and new direct spending, as subjects on which the President could exercise his line item veto, and the addition of a sunset date of September 30, 2000. S.4189.

Because the Line Item Veto Act ultimately enacted was similar to the enhanced rescission version passed by the House in H.R. 2, and not the separate enrollment substitute, much of the Senate discussion is no longer relevant. Nonetheless, despite these differences, many of the same issues were raised on the floors of both Houses, generally with the same result. Indeed, the principal Senate sponsor of the line item veto, Sen. McCain, recognized the essential similarity between enhanced rescission and separate enrollment. S.4076.

The most significant decision in both Houses was whether to adopt a "strong line item veto" (in the Senate, separate enrollment, in the House, enhanced rescission) or to adopt expedited rescission, essentially the same debate as had occurred in committee between S. 4 and S. 14, and had occurred on the House floor. As Sen. McCain said at the outset of the Senate floor debate, "it will boil down to one single issue, have no doubt about it, and that is whether we would have a two-thirds vote on the part of both Bodies in order to override the President's veto—that is what 43 Governors have and that is what the constitutional

meaning of veto is—or whether we will have a majority vote of one House. . . ." S.4158. Or, as he put it earlier, the question "will be, is the Congress of the United States prepared to transfer significant power from the legislative branch of Government to the executive branch of Government for the sake of the future of our children?" S.4079.

Sen. Coats, a co-sponsor with Sen. McCain of a "strong" line item veto, described the Dole substitute as one with bipartisan support "that is a real veto requiring two-thirds of the Congress to override . . .." S.4192. He subsequently referred to the two-thirds requirement as "the core concept of line item veto," S.4220, including separate enrollment as a device that "also can be described as line item veto . . .." S.4221. Similarly, another supporter of the line item veto, Sen. Craig, described the two-thirds override as "really at the heart of all of this." S.4222. Thus, near the end of the debate, he observed that the "only material difference remaining between the Dole and Daschle [S. 14] versions is whether you want a line item veto to be overridden by a majority vote or a [two-thirds] vote." S.4479. A substitute "expedited rescission" alternative, which was very similar to S. 14, was introduced by Senators Daschle, Exon, and Glenn, and a motion to table it passed by a vote of 62-38. S.4428.

Two amendments were adopted on the Senate floor that are of some significance. The first, the so-called Exon "lock box" amendment, S.4259, was agreed to by consent. S.4326. The "lock box" device ensures that any savings from a Presidential cancellation are used solely to reduce the deficit. Thus, once the congressional review process has concluded, the administrative and legislative entities that keep track of the

budget make the changes permanent, thereby preventing Congress and the President from spending the money on something else, or from spending the canceled funds for their appropriated purposes if circumstances change.

The second adopted amendment was Sen. Simon's expedited judicial review provision. S.4244. Like its House counterpart, it provided for Member standing, a special three-judge court, direct appeal to the Supreme Court, and expedited consideration in both Courts. Sen. McCain stated that he was "in agreement, except with one caveat," that a severability clause be added. S.4244. Sen. Simon said that he believed this could be worked out, and Sen. McCain stated that he wanted to ensure that if "one minor provision of the Act is declared unconstitutional, I would not want the entire Act to be declared unconstitutional." S.4245. Shortly thereafter, the Senate agreed to the Simon amendment which included a separate severability provision. S.4259.

Part of the willingness of all Members of the Senate to accept the expedited judicial review provision was the recognition that, even without the exercise of an item veto, legislative practices would change immediately as a result of the President's new power to wield the item veto. Sen. McCain himself, at the opening of the debate, observed that "it will be very hard to measure the exact effect of a line item veto, because when a line item veto is threatened, we will find a dramatic reduction in the kinds of anecdotal appropriations which have plagued this body's reputation with the American people." S.4076. Sen. Coats observed that "it will change the spending habits of Congress . . . [w]e will never know the amount of money we save for items that will not be

put in these new bills for fear of exposure. Because the President has the line-item veto, it will change the way we put the bills together in the first place." S.4140. Or, as another strong line item veto supporter, Sen. Smith, observed, "if we pass the line item veto, there is going to be a lot less of the stuff put in the bill in the first place. That is for sure." S.4142. Sen. Coats made a similar point later on:

> So we will never be able to total up the amount of money that we have saved for our constituents and for the taxpayer because the line item veto will have accomplished its purpose—its purpose being to prevent this kind of activity from taking place in the first place; to prevent the kind of embarrassment that we go through on an annual basis when we discover the items that have been slipped into the appropriations bills, slipped into legislation, slipped into tax bills at the last minute in conference behind closed doors late at night, and then presented in a massive bill.

S.4221. Or, as he also noted, the line item veto power "will fundamentally change the way we think and behave. That fundamental change will mean that items which would have been attached to appropriations bills or would have been incorporated in the tax bills will not be, because of the fear that they will be exposed to public scrutiny before it finally becomes law." *Id.* *See also* S.4240 ("My guess is that many will not see the light of day because those items are items that we know cannot generate a majority of support, otherwise they would be brought as individual items to this floor . . . [o]nly we know in our hearts and in our minds what items we might have attached if we had not had line-item veto.").

Another important theme throughout the Senate floor debate was that the inclusion of the authority to item veto limited tax benefits and new items of direct spending (entitlement) was an essential element of the ultimate compromise. S.4125-26 (Stevens); S.4126 (McCain); S.4127 (Coats); S.4174 (Lott, tax deals); S.4220 (tough negotiations to bring in the tax and entitlement aspects); S.4234 (Coats, describing direct spending and tax benefits); S.4296 (Santorum, explaining bill had bipartisan support and reached tax benefits and entitlement); and S.4420 (Kyl, emphasizing the importance to Democrats of the tax benefits, lock box, and sunset provisions).[4]

With more than sixty Senators voting to reject Senator Daschle's "expedited rescission" substitute, passage of a separate enrollment bill was assured. When the final vote was taken on S.4 on March 23, 1995, 69 Senators voted in favor and 29 opposed. S.4484-85.

3. The Conference

S. 4 was returned to the House where it was considered on the floor on May 17, 1995. H.5090-97. Rep. Clinger moved to strike the substance of the Senate bill and replace it with the House bill so that the matter could then proceed to conference. H.5090. Speaking in support of his motion, Chairman Clinger referred to the Senate version as a "weaker bill" and stated that he expected a "difficult conference" be-

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[4] Sen. Hatch the Chairman of the Judiciary Committee, also offered an amendment, narrower than the one offered in the House, to exempt certain functions of the Judiciary, not including building of courthouses, from the Act. S.4341. After debate, a motion to table the Hatch Amendment was approved 85-15. S.4435-43.

cause the House bill "has a potential constitutional challenge" whereas the Senate bill "would require the enrollment of thousands of bills to pass appropriations in discrete line items requiring thousands of signatures and guaranteeing future Presidents an amazing case of writer's cramps as they deal with this as well as creating some significant amount of paperwork." H.5091. His motion was agreed to without a recorded vote. H.5094.

On March 21, 1996, nearly a year after both Houses had passed a line item veto bill, the Conference reached agreement. *See* Line Item Veto Act, H.R. Conf. Rep. 104-491, 104th Cong., 2d Sess. (1996) (hereafter "Conf. Rep."). Other than using the bill number S. 4 as the vehicle, the conference version bore no relation to the Senate-passed bill, but was quite similar to H.R. 2 as passed by the House.

First, the chosen version of the line item veto was not separate enrollment but enhanced rescission. The law's full title is "An Act to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." Conf. Rep. at 14. The President's item veto power is triggered when a bill or resolution "has been signed into law pursuant to Article I, Section 7 of the Constitution." Section 2(a) (adding ICA § 1021(a)).[5] The Conferees also reduced to five days the time in which the President could exercise his veto authority after signing. *Id.*

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[5] Citations are to the sections of the Act as set forth in the Conference Report. References are also given to the new sections added to part C of Title X of the Congressional Budget and Impoundment Control Act of 1974.

The Conferees explained that they "specifically include[d] the requirement that a bill or joint resolution must have been signed into law in order to clarify that the cancellation authority only becomes effective after the President has exercised the constitutional authority to enact legislation in its entirety. This requirement ensures that the President affirmatively demonstrates support for the underlying legislation from which the specific cancellations are then permitted." Conf. Rep. at 20. The Conferees intended that the cancellations would occur "as soon as possible" and provided a "maximum time" of five days only "to ensure that all supporting material required for inclusion in the special message can be provided by the Administration." *Id.* at 22.

The President is given authority to "cancel" in whole any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit. Section 2(a) (adding ICA § 1021(a)(1) - (3)). The terms "cancel" or "cancellation" are defined in section 1026(4). With respect to discretionary budget authority, "cancel" is defined to mean "rescind." *Id.* (adding ICA § 1026 (4) (A)). With regard to items of new direct spending, such as new entitlement or increases in existing entitlement, the term "cancellation" means "to prevent [the item] from having legal force or effect." *Id.* (adding ICA § 1026(4)(B)).[6]

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[6] "Direct spending" is defined to mean "(A) budget authority provided by a law (other than an appropriation law, (b) entitlement authority; and (c) the food stamp program." Section 2(a) (adding ICA § 1026(5)). An "item of new direct spending" means "any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending relative to the most recent levels calculated pursuant to section 257 of the Balanced Budget and Emergency

Similarly, with respect to limited tax benefits, cancellation prevents "the specific provision of law that provides such benefit from having legal force or effect." *Id.* (adding ICA § 1026(4)(C)). The Conference Report states, "[t]he term 'cancel' was specifically chosen, and is carefully defined in section 1026. The conferees intend that the President may use the cancellation authority *to surgically terminate federal budget obligations.*" Conf. Rep. at 20 (emphasis added). In contrast to the House bill, which allowed the President to reduce as well as to eliminate items, the final version limits the power of the President to cancel items "in whole." *Id.* (adding ICA §§ 1021(a), 1026(7)). To further clarify that a cancellation of budget authority terminates the spending authority, the Act adopts a "lock box" procedure so that the "savings" cannot be used for a subsequent appropriation or direct spending measure or tax benefits. *See* Section 2(a) (adding ICA § 1024).

Like the versions that passed both Houses, the President's authority is not limited to items specified in the legislation itself. The veto power reaches not only the "entire dollar of budget authority" that is "specified in an appropriation law" but also amounts "required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." *Id.* (adding ICA § 1026 (7) (A) (i)).

Deficit Control Act of 1985." *Id.* (adding ICA § 1026(8)). To be subject to the President's cancellation power, legislation providing for direct spending need not result "in a net increase" in spending, as "[a] provision of a future law that increases direct spending would be subject to the President's cancellation authority whether or not it is offset by another provision that reduces direct spending or increases revenues in the same law." Conf. Rep. at 36.

The cancellation authority also extends to amounts "represented separately in any table, chart or explanatory text included in the statement of managers or the governing committee report accompanying such law." *Id.* (adding ICA § 1026(7) (A) (ii)).[7] An example in the Conference Report—referring to use of a table accompanying a Conference Report—illustrates the kind of legislative materials the President may use in exercising the item veto. Conf. Rep. at 22-23. The President, however, "cannot use this authority to modify or alter any aspect of the underlying law, including any restriction, limitation or condition on the expenditure of budget authority, or any other requirement of law." *Id.* at 20.

Line item veto of "limited tax benefits" remains basically as it was enacted in both Houses. "Limited tax benefits" are "any revenue-losing provision" that provides a "deduction, credit, exclusion, or preference" to 100 or fewer taxpayers during any fiscal year that the rule is in effect, unless it is a transition provision, in which case the number of taxpayers is 10 or fewer. Section 2(a) (adding ICA § 1026(9)). One significant addition in the Conference was a process for identification of limited tax benefits. Under a new provision, if either the bill itself identifies a provision as a limited tax benefit, or the Joint Committee on Taxation does so, those are the exclusive provisions that the President may cancel. *Id.* (adding ICA § 1027)). If neither of these sources identifies any such benefits, however, then the President may use

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[7] *See also* Section 2(a) (adding ICA § 1026(7) (A) (iv)) (enabling cancellation of procurement costs based on the estimated costs multiplied by the quantities of items specified in appropriations laws or in accompanying committee reports).

the definitions under section 2(a) of the Act (adding ICA § 1026) to select benefits to be canceled. Finally, the Act precludes judicial review of Congressional identifications of a limited tax benefit. *Id.* (adding ICA § 1027 (d)).

Under the Conference bill, the procedures to be followed for the President to exercise a line item veto are basically the same as in the earlier enhanced rescission versions. As a prerequisite to issuing a cancellation order, the President must determine only that the cancellation will "(i) reduce the federal budget deficit, (ii) not impair any essential Government functions, and, (iii) not harm the national interest." *Id.* (adding ICA § 1021(a) (3) (A)). The President must send a single cancellation message for all items he wishes to cancel in each law. *Id.* (adding ICA § 1022(a)). He has five calendar days, excluding Sundays, to submit his message after enactment. *Id.* (adding ICA § 1021(a) (3) (B)).

The cancellation order is effective immediately upon receipt in the Congress. *Id.* (adding ICA § 1023(a)). As the Conference Report stated:

> Upon receipt of the President's special message in both the House of Representatives and the Senate each [item] identified in the special message is immediately canceled. The cancellation of a dollar amount of discretionary budget authority automatically rescinds the funds. With respect to an item of new direct spending or a limited tax benefit, the cancellation renders the provision void, such that the obligation of the United States has no legal force or effect.

Conf. Rep. at 22. The Report also noted that the cancellation "is nullified only if a disapproval bill is

enacted into law [in which case the] effective date for any cancellation . . . is the original date provided in the law to which the cancellation applied." *Id.* Finally, even if Congress has insufficient time to act before adjourning sine die, the cancellation continues in effect, and the disapproval period is started again in the next Congress. Section 2 (a) (adding ICA § 1025 (b) (3)).

The Act provides for expedited congressional consideration of a disapproval bill. *Id.* (adding ICA § 1025). No Congressional approval is needed to make the President's cancellation effective. Conf. Rep. at 22. In essence, Congress has 30 calendar days of session after receipt, although in the Senate, if the process is underway when the 30 days expire, the expedition rules continue to apply. In the House all items in the President's cancellation message must be included in a disapproval resolution, a limit that does not apply in the Senate. Section 2(a) (adding ICA § 1025 (c)(2)). The relevant House committee is given seven days to report the bill without amendment, and the only floor amendments that are in order are those to strike a cancellation item, which require the sponsorship of at least 50 Members. *Id.* (adding § 1025 (d)). In the Senate, additions or deletions of particular items are in order, and there is no minimum number of Senators required. *Id.* (adding § 1025(B) (4)). After the expiration of the 30 days for expedited consideration, unless there is a disapproval bill enacted within 10 calendar days, the cancellation is permanent. *Id.* (adding ICA §§ 1024(b)-(c)).

The Conferees also included a judicial review provision, *see* section 3, 110 Stat. 1211 (codified at 2 U.S.C. § 692), although they deleted the requirement for a three-judge court that was in both the Senate

and House bills. There is no explanation in the Conference Report for this change, but it appears to have been prompted by a letter from then Director of the Office of Management and Budget, Alice Rivlin, stating the Administration's opposition to three-judge courts (copy attached). Two other changes of note occurred in this provision: it was expanded to cover "any individual adversely affected by [this Act]," and the severability provision added in the Senate was deleted. Section 3.

The Conferees agreed that the bill would be made effective on the earlier of the enactment of "a seven-year plan for deficit reduction [and to] achieve a balanced Federal budget," or January 1, 1997. Section 5. And while the sunset provision that the Senate had insisted upon was included, the sunset date was extended until January 1, 2005, giving the Act a life of eight rather than five years. *Id.*

Not surprisingly, once agreement had been reached, the floor debates on March 27 and March 28, 1996, primarily explained what had already taken place. S.2929-95 and H.2971-3028. For example, in his opening statement, Senator McCain described the President's "cancellation authority" as the power "to surgically eliminate Federal budget obligations," which "automatically rescinds the [discretionary budget] funds;" and for an item of new direct spending or a limited tax benefit, he observed "the cancellation renders the provision void, such that the obligation of the United States has no legal force or effect." S.2930.

Senator Stevens, an earlier doubter but an eventual convert, described the bill as "the most significant delegation of authority by the Congress to the President since the Constitution was ratified in 1789 . . .

It is a major, major, change in the policy of the Congress toward the executive branch." S.2955. He further called the veto "a major change in the balance of Government power. It is really a check on the check of the checks and balances." S.2957. Other major supporters of S. 4 echoed the same theme. Senator Gramm said that there is "no doubt about it —and the distinguished Senator from West Virginia [line item veto opponent and plaintiff Senator Byrd] is right—it changes the balance of power between the Congress and the President in one fundamental way: It gives the President enhanced power to say 'no' to spending." S.2960. Another strong supporter, Senator Kyl, made a similar point: "Make no mistake about it, this bill will shift a great deal of new power to the President." S.2978.

One last effort was made to stop the bill on the Senate floor. Senator Byrd moved to recommit the Conference Report with instructions to substitute S. 14 in its place. S.2949. The motion was tabled by a vote of 58 to 42, and the bill passed 69-31. S.2995.

The proceedings on the House floor also produced an unsuccessful attempt to recommit, H.3024-25, which failed by a vote of 192-228, followed by a final passage of 328 to 91 H.3028. On April 9, 1996, President Clinton signed the Line Item Veto Act of 1996. *See* Public Law 104-130, 110 Stat. 1200 (1996).

EXECUTIVE OFFICE OF THE PRESIDENT
Office of Management and Budget
Washington, D.C.

THE DIRECTOR September 11, 1995

Honorable Robert Dole
Majority Leader
United States States
Washington, D.C. 20510

Dear Mr. Leader:

Now that the House has finally appointed conferees, I am writing to urge Congress to complete action on line-item veto legislation by the beginning of FY 1996 and to make the authority applicable to all spending bills for that year.

Since House and Senate passage of line-item veto legislation more than 5 months ago, the President has repeatedly urged Congress to complete work quickly, so he can use item veto authority—this year—to curb wasteful spending.

We are, of course, pleased that the House appointed conferees last week and voted to instruct conferees to make the authority applicable to FY 1996 appropriations measures. But Congress must act quickly to make this authority effective. We must not let another year go by without giving the President authority to eliminate special interest provisions which waste increasingly scarce public resources.

In his May 8 letter to Majority Leader Dole and Speaker Gingrich, the President stated that "the House-passed bill is much stronger—and more work-

able." To expedite completion of this important legislation, the President asked that I provide you with our recommendations for a few technical improvements to the House bill.

First, while the House bill has a strong rescission mechanism, its ability to save money could be further enhanced by: (i) adopting a more workable definition of targeted tax benefit, along the lines of the Senate version; and (ii) adopting the Senate position on extending rescission authority to new direct spending.

Second, with regard to targeted tax benefits—the Justice Department strongly urges that the House bill use the terms "deny the availability of" and "suspend," in lieu of "veto" and "repeal"; and the Treasury Department urges that a provision be added to authorize the IRS to take enforcement action against individuals or entities seeking to use a targeted tax benefit when that benefit has been suspended.

Three additional technical recommendations are: (i) enhance the ability of the Administration to review carefully all tax and spending provisions by increasing the window for transmittal of special messages from 10 days to 20 days; (ii) include a severability provision in the legislation; and (iii) delete the 3-judge court judicial review mechanism but retain the requirement for expedited consideration (considerable litigation experience has shown that 3-judge courts are often inefficient and cumbersome and can actually cause considerable delay).

Whatever version of the bill the conference committee chooses to report, I offer the technical assistance

of OMB staff to help iron out issues which arise as you move ahead with such legislation.

Again, the Administration urges you to complete action quickly on this important authority to help the President hold the line against wasteful spending.

Sincerely,

/s/ ALICE M. RIVLIN
ALICE M. RIVLIN
Director

IDENTICAL LETTERS SENT TO CONFEREES AND LEADERSHIP.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 97-0001 (TPJ)

SEN. ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, ET AL., DEFENDANTS

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiffs hereby submit their Statement of Material Facts As To Which There Is No Genuine Issue in support of Plaintiffs' Motion for Summary Judgment.

Parties

1. Plaintiff Robert C. Byrd is a Senator from the State of West Virginia and a duly elected member of the 105th Congress. Senator Byrd's current term of service will expire on January 3, 2001.

2. Plaintiff Mark O. Hatfield was a Senator from the State of Oregon. He has represented the State of Oregon for five consecutive terms, beginning in 1967. His term of service expired and he retired from the Senate on January 3, 1997.

3. Plaintiff Carl Levin is a Senator from the State of Michigan and a duly elected member of the 105th Congress. Senator Levin's current term of service will expire on January 3, 2003.

4. Plaintiff Daniel Patrick Moynihan is a Senator from the State of New York and a duly elected mem-

ber of the 105th Congress. Senator Moynihan's current term of service will expire on January 3, 2001.

5. Plaintiff Henry A. Waxman is a Representative from the Twenty-Ninth Congressional District of California and a duly elected member of the 105th Congress.

6. Plaintiff David E. Skaggs is a Representative from the Second Congressional District of Colorado and a duly elected member of the 105th Congress.

7. Defendant Franklin D. Raines, Director of Office of Management and Budget, and defendant Robert E. Rubin, Secretary of the Treasury, have certain assigned responsibilities in executing the Act. Defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority and defendant Rubin is responsible for executing the President's cancellation of "limited tax benefits."

The Line Item Veto Act of 1996

8. The Line Item Veto Act ("Act") was signed into law by President Clinton on April 9, 1996. *See* Pub. L. No. 104-130, 110 Stat. 120 (to be codified at 2 U.S.C. 681 note, 691 *et seq.*).

9. The Act became effective on January 1, 1997 and expires on January 1, 2005. 2 U.S.C. § 691 note.

10. The Act purports to give the President the authority to "cancel in whole," at any time up to five days (excluding Sundays) after signing a bill into law, any dollar amount of appropriation, any items of direct spending, or any limited tax benefit contained in that law. 2 U.S.C. § 691(a).

11. Under the Act, the President must notify Congress of a "cancellation" by submitting a "special message" within five calendar days (excluding Sun-

days) after the enactment. 2 U.S.C. § 691(a)(B). The President may send only one special message covering each bill. *Id.*

12. The Act defines "cancel" to mean "rescind" in the case of an appropriation, and "prevent . . . from having legal force or effect" in all other cases. 2 U.S.C. § 691e(4).

13. Under the Act, the President may cancel an amount, item, or benefit so long as he "determines that such cancellation will (i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest. . . ." 2 U.S.C. § 691(a).

14. The cancellation takes effect upon Congress' receipt of the special message and, in the case of a cancellation of discretionary budget authority, results in the simultaneous reduction of the dollar amount of the relevant appropriation. 2 U.S.C. § 691b.

15. The cancellation rescinds any dollar amount of discretionary budget authority or prevents items of new direct spending or limited tax benefits from having legal force or effect. 2 U.S.C. § 691e(4).

16. Both the Office of Management and Budget and the Congressional Budget Office must make designated revisions in budget estimates and reports once the period for enactment of a disapproval bill expires. 2 U.S.C. § 691c.

17. With respect to appropriations, the Act permits the President to cancel any amount stated in the law itself and also any amount separately stated in any table, chart or explanatory text in the statement of managers or in any governing committee report accompanying the law. 2 U.S.C. § 691(7) (ii).

18. Under the Act, "direct spending" is defined as "(A) budget authority provided by law (other than an

appropriation law); (B) entitlement authority; and (C) the food stamp program. 2 U.S.C. § 691e(5). The Budget Act defines "entitlement authority" to be authority (including for loans and grants) to make payments "to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law." 2 U.S.C. §§ 622(9) and 651(c)(2)(C). "Item of new direct spending" means any provision that is estimated to result in an increase in direct spending over the baseline established by the Office of Management and Budget under the Balanced Budget and Emergency Deficit Control Act of 1985. 2 U.S.C. § 691(e)(8). Decl. of Senator Moynihan ¶ 6.

19. Under the Act, a "limited tax benefit" includes any "revenue-losing provision" that provides "a Federal tax deduction, credit, exclusion or preference to 100 or fewer beneficiaries under the Internal Revenue Code of 1986 in any fiscal year," or any federal tax provision that "provides permanent or transitional relief for 10 or fewer beneficiaries" from a change in the Internal Revenue Code. 2 U.S.C. § 691e(9); *see also* Decl. of Senator Moynihan ¶ 12.

20. Each special message transmitted by the President is referred to the appropriate Congressional committees. Congress may within thirty days pass a "disapproval bill" disapproving one or more cancellations. A disapproval bill must be enacted into law under the procedures proscribed by Article I, section 7 of the Constitution: bicameral passage, presentment to the President, and a 2/3 vote by Congress to override a Presidential veto. 2 U.S.C. §§ 691d, 691e(6).

21. Only if a disapproval bill is enacted into law are Presidential cancellations nullified. 2 U.S.C. § 691b(a).

22. The Act provides that any Member of Congress adversely affected by the Act may bring an action in this Court for declaratory and injunctive relief "on the ground that any provision of this part violates the Constitution." 2 U.S.C. § 692(a).

The Budget Calendar for 1997

23. Section 300 of the Congressional Budget Act of 1974 establishes the following timetable for the congressional budget process in a fiscal year:

On or before:	Action to be completed:
First Monday in February	President submits his budget
February 15	Congressional Budget Office submits report to the Budget Committees
February 25	Committees submit views and estimates to Budget Committees.
April 1	Senate Budget Committee reports concurrent resolution on the budget.
April 15	Congress completes action on concurrent resolution on the budget.

May 15	Annual appropriation bills may be considered in the House.
June 10	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriation bills.
October 1	Fiscal year begins.

24. Budget negotiations and the work of the Committee on Appropriations begins when the President submits his budget on the first Monday in February. Subcommittees of the two Committees on Appropriations will schedule hearings in February to hear testimony from departmental and agency officials. By April 1, the Senate Budget Committee will report a concurrent resolution on the budget. The annual budget resolution distributes total budgetary authority among committees in the two Houses, including the Senate and House Committees on Appropriations. With those allocations, the two appropriations committees will distribute budget authority and outlays among their subcommittees, and the process of marking up appropriations bills will begin. Floor activity will begin in the House in May and June. Formal Senate mark up of bills will begin when they are received from the House. Decl. of Senator Byrd ¶ 16.

25. Thus, by late spring and certainly by early summer, votes on appropriations bills subject to the Line Item Veto Act will be cast first at the committee level in each House, and then on the floors of the two chambers. During September, votes on final passage of appropriations bills will occur in both chambers in order to complete action before the beginning of the fiscal year on October 1. *See* Decl. of Senator Byrd ¶ 16.

26. Within the next three to four weeks, the House Appropriations Committee will receive requests for supplemental appropriations for the current fiscal year. Decl. of Representative Skaggs ¶ 5. These requests will deal with national security matters, disaster relief, and forest fire fighting, and will require immediate attention by the Appropriations Committee. Thus, it is very likely that negotiations and votes on supplemental appropriations bills subject to the Line-Item Veto Act will have occurred even before this case is set for oral argument on March 21, 1997, and will continue thereafter. *Id. See also* Decl. of Senator Byrd ¶ 17.

Respectfully submitted,

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Counsel for Plaintiffs

Date: January 27, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 97-0001 (TPJ)

SENATOR ROBERT C. BYRD, ET AL., PLAINTIFFS

v.

FRANKLIN D. RAINES, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, ET AL., DEFENDANTS

DEFENDANTS' STATEMENT OF GENUINE ISSUE

In accordance with Rule 108(h) of the Rules of this Court, defendants state that there are no material facts as to which they contend there exists a genuine issue necessary to be litigated. However, defendants dispute the following al egations in Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue ["Pl. Stat."]:

1. Defendants dispute plaintiffs' allegation that defendant Rubin "is responsible for executing the President's cancellation of 'limited tax benefits.'" Pl. Stat., ¶7. The Line Item Veto Act assigns no responsibilities to defendant Rubin. 2 U.S.C. 681 note, 691 *et seq.*

2. Defendants dispute plaintiffs' allegations that specified actions by the Legislative and Executive Branches on appropriations "will" occur or are "very likely" to occur by specified dates. Pl. Stat., ¶¶24-26. The declarations upon which plaintiffs' allegations are based represent only the declarants' personal

projections about these actions. Declaration of Senator Robert C. Byrd, dated January 24, 1977, ¶¶16-17; Declaration of David Skaggs, dated January 25, 1977, ¶¶4-5.

Respectfully submitted,

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STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANTS' CONTEND THERE IS NO GENUINE ISSUE

In accordance with Rule 108(h) of the Rules of this Court, defendants state that there is no genuine issue as to the following material facts:

1. The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, to be codified at 2 U.S.C. 681 note, 691 *et seq.*, was enacted on April 9, 1996, and will expire on January 1, 2005.

2. Defendants have not taken any actions pursuant to the Line Item Veto Act.

3. The President has not exercised the cancellation authority conferred on him by the Line Item Veto Act.

Respectfully submitted,

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Civ. Action No. 97-0001(TPJ)

SENATOR ROBERT C. BYRD, ET AL., PLAINTIFFS

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FRANKLIN D. RAINES, ET AL., DEFENDANTS

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANTS' CONTEND THERE IS NO GENUINE ISSUE

The parties agree that there are no material facts as to which there is a genuine issue that preclude resolution of the legal issues on summary judgment. Pursuant to Local Rule 108(h), plaintiffs respond to Defendants' Statement of Material Facts As To Which Defendants' Contend There Is No Genuine Issue:

1. Agreed.

2. Plaintiffs do not dispute that defendants have not taken any actions pursuant to the Line Item Veto Act. Nonetheless, plaintiffs contend that the operation of the Line Item Veto Act exerts a present, concrete injury upon them in their role as legislators. *See* Declaration of Senator Byrd ¶¶ 18-21; Declaration of Senator Levin ¶¶ 6-7; Declaration of Senator Moynihan ¶¶ 17-22; Declaration of Representative Skaggs ¶¶ 4-6.

3. Agreed.

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Counsel for Plaintiffs

Date: March 7, 1997

(ORDER LIST: 520 U.S.)

WEDNESDAY, APRIL 23, 1997

ORDER IN PENDING CASE

96-1671 RAINES, DIR., OMB, ET AL. v. BYRD, ROBERT C., ET AL.

The motion of the parties to expedite consideration of the appeal is granted. In this case probable jurisdiction is noted. The parties' briefs are to be filed with the Clerk of this Court and served upon opposing counsel on or before 3 p.m., Friday, May 9, 1997. Reply briefs, if any, may be filed with the Clerk of this Court and served upon opposing counsel on or before 3 p.m., Wednesday, May 21, 1997. Briefs may be submitted in compliance with Rule 33.2 to be replaced as soon as possible with briefs prepared under Rule 33.1. Rule 29.2 does not apply. Oral argument is set for Tuesday, May 27, 1997, at 10 a.m.